

LAW, LEGISLATION, AND DEMOCRACY: COOPERATION AND CONTESTATION BETWEEN  
CONGRESS, THE SUPREME COURT, AND THE EXECUTIVE IN THE DETERMINATION OF  
STATUTORY MEANING

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LAW, LEGISLATION, AND DEMOCRACY: COOPERATION AND CONTESTATION BETWEEN  
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In this dissertation, I examine the conditions under which various models of the American State can best explain the lawmaking process, which is centered upon, and must contend with, the separation-of-powers framework. I challenge the hegemonic claims of two of the main theories of state behavior, what I label as the Democracy Model, drawn from pluralism, and the Competitive/Institutional Model, grounded in rational choice theory. To do so, I lay out the conditions for a new model, the State-Centered/Cooperative Model, which assumes a more cooperative spirit of behavior by state actors as they seek to govern and enhance the legitimacy of their own institutions and the state as a whole. The conditions that give rise to these competing, and complementary, models of state behavior are theorized in the initial chapters, while the remainder of the dissertation offers strong empirical support for the presence of this new State-Centered/Cooperative Model.

Through the creation of two unique and original databases on congressional-court interactions, I demonstrate the frequent and routine interactions between Congress and the courts through a detailed examination of legislation that I refer to as “reaction bills.” These bills are defined by the distinct fact that they, at least in part, represent specific congressional responses to court decisions. One of the key observations to emerge from this data is the communicative nature of the relationship between Congress and the federal courts, particularly the Supreme Court, and the attention given by members of Congress to the views of the Court and the Executive Branch in deciding what cases warrant further congressional action. This point is further confirmed by a second database including all of the Supreme

Court's statutory decisions between the 1986 and 1995 terms. Relying on these two original databases, I deploy a series of event duration empirical models to examine the conditions under which Congress is most likely to react to Supreme Court decisions. The results of this analysis reveal a strong relationship between "signals" from the Judicial and Executive branches identifying specific concerns over a particular statutory framework and subsequent actions by Congress to overturn, modify, or codify those laws.

## BIOGRAPHICAL SKETCH

Christopher J. Casillas holds a Ph.D. and M.A. in Government from Cornell University, a J.D. from Seattle University School of Law, and a B.A. in Political Science from the University of California, Santa Barbara. He is from Lake Forest Park, WA and currently resides in Seattle, WA with his wife, daughter, and a new addition to be born in February 2012. He is an active member of the Washington State Bar Association and has been practicing law since 2003.

For Jennifer and my parents, Ed and Ginger.

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While I am immensely proud of the substantive work presented in the pages that follow, my true accomplishment here is simply arriving at this point. My journey in just making it to graduate school to begin with, navigating through its various obstacles, and finally completing this work has represented a most unusual and complicated trajectory, and it is one that I undoubtedly could not have managed without the unfailing support of my wife, Jennifer, and my parents, Ed and Ginger, to each of whom this work is dedicated.

At every stage of this process, Jennifer has redefined the meaning of commitment and true love. I have asked so much of her throughout this process, from interrupting her career to move across the country with me to many a night and weekend being on what we affectionately call “Mia duty”—watching our daughter while I toiled away at writing this dissertation. Her encouragement, sense of purpose and determination, even during some of my most difficult moments when I was on the brink of abandoning this entire effort, are undoubtedly the principal reason behind the completion of this work. If she were the type of person to keep score, I would forever be in her debt. I also cannot forget to acknowledge my gratitude toward our two year old daughter Mia for motivating me in completing this project. While inadvertent, there is nothing in this world like a sweet little girl tugging on your shirt sleeve while typing at the computer and saying “Daddy play” to encourage one to bring a project like this to completion as quickly as possible.

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teaching me to “think like a scientist.” Having written much of the dissertation back in Seattle, I have also relied extensively on both of them to help generate ideas and navigate some of the challenging empirical sections of the dissertation in addition to benefiting from their willingness to review and edit much of my work. Their ongoing and selfless dedication to my success, as exemplified throughout my graduate school career, sets the bar for parenting that I can only hope to reach at some point in my own life as a parent.

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We developed a good friendship while I was at Cornell and had many fascinating discussions about the courts and the Constitution.

Finally, hats off to my cohort in the Government Department. I will forever cherish and think fondly of my few years in Ithaca at Cornell, and much of that is due to the many good friends and colleagues I made while there. My first year at Cornell was a difficult transition for me, both in terms of leaving a professional career as an attorney and going back to school and because I had started off this journey as a political theorist. That transition, while rocky, eventually gave way to a productive and happy time for me, and much of the credit for this goes to the support I received from many colleagues at Cornell. In particular, I would like to acknowledge my friendship with Michael Miller and Keith Tonsager. As fellow scholars in American politics, the three of us spent considerable time together working on papers and attending conferences. While we did not always see eye-to-eye, I learned a great deal from both of them and hope that I will be able to maintain a lifelong friendship with both.

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# Introduction

All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications.

-- James Madison, Federalist No. 37

For scholars of American political institutions, the topic of lawmaking occupies a central space within much of the recent literature (Clinton and Lapinski 2006; McCarty, Poole, and Rosenthal 2005; Cox and McCubbins 2005; Binder 1999; Coleman 1999; Epstein and O'Halloran 1999; Krehbiel 1998; Mayhew 1991). Developing a theory of lawmaking is important not only in an effort to explain how bills become law, but also because on the surface, it is unclear how any bill ever becomes law in light of one of the defining features of the American system—the *separation of powers* framework. What incentive is there for these distinct branches with their own power bases and unique constituencies to work with one another to pass a singular law let alone hundreds of laws on average each Congress, particularly in an era of divided government? Since lawmaking is also one of the key components in the overall governance process, any insights into how laws are developed in this country necessarily enlightens our understanding of how governance, as a whole, is undertaken in America.

In an effort to solve the lawmaking puzzle, much of this literature has come to focus on the roles, behavior, and interactions between, and within, both the *legislative* and the *executive* branch (Calvert, Moran, and Weingast 1989; McCubbins, Noll, and Weingast 1987; Krehbiel 1996, 1998; Cameron 2000). With this focus, at least two key frameworks for modeling the policy development process have emerged. One model, advanced by political positivists, understands *conflict and contestation as the defining features* underlying the relationship between these two branches of government. The *act of bargaining*, in turn, can be understood as the “modus operandi of governance” in America and the means by which this conflict can be mediated and resolved as the distinct branches of the federal government are forced to work with one another in an effort to govern the nation

(Cameron 2000, xiii; See also Cox and McCubbins 2004; Krehbiel 1998; Mayhew 1991). In contrast, pluralists have advanced a model that understands policy development as the result of motivated individuals and interests groups being able to penetrate the apparatus of the state itself (Greenberg 1990; Peretti 1999). The strength and ability of these various groups in gaining access to these institutions directly influences the success and direction of public policies that are then produced in spite of any division in authority and power across the branches.

While each of these models can explain the success of particular policies, and potentially predict the conditions for future change, they each have important limits and deficiencies that will be highlighted and discussed throughout this dissertation. Most significantly, both models suffer from the myopic assumption that they explain the universe of governing behavior as political actors work to develop new laws. Much of the empirical data presented in the forthcoming chapters helps to refute the idea that either of these models can explain, uniformly, the behavior of political actors as the various branches interact with one another to produce public policies. There is also reason to question two critical assumptions in each of the respective models. While conflict may dominate many of the interactions between the branches as they seek to exert their preferred positions, is there any reason to think that a more cooperative spirit also exists within the policy-making process? Also, is it possible that change can originate, and be motivated by, forces endogenous to the state itself as opposed to the external forces uniformly assumed by pluralists?

Part of the deficiency in the models to date may also be explained by an omission in much of the literature that largely ignores the important and critical role played by the *judiciary*, the third of the three branches, within the lawmaking and governance process. There have been a number of important and thoughtful pieces on the relationship between Congress and the judiciary (Epstein, Knight, and Martin 2001; Epstein and Knight 1998; Meernik and Ignagni 1997; Segal 1997; Epstein and Walker 1995),

but very little of that is situated within an overall context of lawmaking, focusing instead mostly on the behavior of actors within these two branches as they seek to maximize their policy preferences.

Additionally, by largely excluding the judiciary from the equation, this literature overlooks the fact that the universe of lawmaking is not limited to the process by which bills are introduced, navigate through Congress, and finally presented to the President. Lawmaking in our system of separated powers is “continuous, iterative, speculative, sequential, and declarative” (Pickerill 2004, 4; Jones 1995) as statutes cycle through the various branches, being originally crafted in Congress, potentially vetoed by the President, interpreted by agencies and the courts, and then cycled back to Congress where additional amendments and revisions are made. By not factoring in the role that the Executive branch, and particularly the Judicial branch, play in interpreting laws and how Congress may respond to those decisions, any attempt to theorize about lawmaking and governance is, by definition, incomplete. The objective of this dissertation is to bring the judiciary back into the lawmaking and governance equation (with a continued focus on the legislative and executive branches) and determine whether the assumptions about behavior and the theories about lawmaking and interbranch relations continue to hold true when this critical piece is included. The following case helps to illustrate these points.

#### *The Lilly Ledbetter Fair Pay Act*

From the period between 1979 through 1998, Lilly Ledbetter had worked for the Goodyear Tire and Rubber Company at their plant in Gadsen, Alabama. During most of her tenure at the plant, she was employed as an Area Manager, and as it was a supervisory position, her pay increases were largely determined through a series of annual performance evaluations given by her manager. Throughout much of this time period, there were 15 other Area Managers with similar duties as Ms. Ledbetter, but the other positions were almost exclusively filled by men during this time. Initially, Ms. Ledbetter’s pay was on par with that of the other male Area Managers, but over time the evidence revealed that the gap between her wages and that of the other male Area Managers grew substantially. By the time of her

retirement, the next lowest Area Manager was paid 15% more than Ms. Ledbetter, with the top position earning around 40% more per year, despite similar duties.

It was not until 1998, after filing a questionnaire with the Equal Employment Opportunity Commission (“EEOC”) on a separate matter, and only a few months before she retired, that Ms. Ledbetter learned of the large pay discrepancy between her and the other Area Managers (all of whom were male at the time). In 1999 she filed a lawsuit claiming, among several other causes of action, that Goodyear had violated Title VII (of the Civil Rights Act) by paying her less than the other Area Managers on account of her sex. Several of the other charges were dismissed at different stages, but the result of a jury trial was a finding that “more likely than not the Defendant paid Plaintiff an unequal salary because of her sex,” in violation of Title VII.<sup>1</sup> The jury recommended an award of around \$225,000 for backpay and mental anguish and over \$3.2 million in punitive damages.

On appeal, the Eleventh Circuit reversed the holding on the Title VII claim on the basis that under the statute of limitations period proscribed in Title VII there was insufficient evidence to conclude that any of the alleged discriminatory acts had occurred within the statutorily prescribed time frame. Under 42 U.S.C. §2000e-5(f)(1), charges must be filed with the EEOC within 180 or 300 days (depending on the State) “after the alleged unlawful employment practice occurred.” On the surface, this provision of Title VII appears to be straightforward, prohibiting the courts from hearing any claims beyond the 180 (or 300) day period from when the unlawful practice occurs. In practice, however, the latent ambiguity in this phrase more clearly emerges. Put simply, it is not clear when the occurrence of the unlawful practice takes place. Does the “occurred” in the statute mean to reference when the original event of discrimination took place, or does it refer to the occurrence of each subsequent paycheck, including her most recent one, that perpetuates and expounds upon the various unlawful discriminatory acts taken

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<sup>1</sup> *Ledbetter v. Goodyear Tire & Rubber Co., Inc.* 550 U.S. 618, 127 S. Ct. 2162, 167 L.Ed.2d 982 (2007).

against the employee over time? Reasonable minds could differ, as was evidenced by the fact that different Courts of Appeals had reached contradictory conclusions, resulting in a split among the Circuits that was the primary basis for the Supreme Court granting *certiorari*.<sup>2</sup>

Seeking to resolve a discrepancy between the Circuits in calculating the appropriate time limitations period for Title VII disparate impact pay cases, the Supreme Court granted *certiorari*, ultimately affirming the Eleventh Circuit's decision and upholding the dismissal of the Title VII claim. Ledbetter argued that each new paycheck she received during the charging period constituted a new violation of Title VII (as it incorporated a discrepancy in her pay on the basis of her sex), so Goodyear could not prevail by asserting a statute of limitations defense. In other words, each time Goodyear paid her, even though the evidence may have been lacking that the more recent pay raises were the product of discrimination, it reinforced earlier decisions by her managers to pay her less on account of her sex, which violates Title VII. But, the Supreme Court disagreed, finding that Congress had made a policy decision in favor of prompt resolution of alleged employment discrimination, and reading the statute of limitations language in the Act so as to bring back to life acts of discrimination that had occurred many years earlier would defeat that purpose and obfuscate the literal reading of the text.<sup>3</sup>

In her multi-pronged dissent from the Court's opinion, Justice Ginsburg took time to present a distinctly different view of the relevant provisions of Title VII and its supporting case law, in addition to discussing the difficulties involved for an employee to discover the type of pay discrimination at issue in this case, which she argued only becomes apparent after a considerable lapse of time. Justice Ginsburg appropriately honed in her discussion on determining what "occurred" means within Title VII. As she noted, it could either be read to mean that each particular decision by the employer on setting wages is discrete from all prior and subsequent decisions, in which case the claim would have to be filed within

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<sup>2</sup> Compare *Goodyear Tire & Rubber Co. v. Ledbetter* 421 F.3d 1169 (C.A.11 2005) with *Forsyth v. Federation Employment & Guidance Serv.*, 409 F.3d 565 (C.A.2 2005); *Shea v. Rice* 409 F.3d 448 (C.A.D.C. 2005).

<sup>3</sup> *Ledbetter*, 550 U.S. at 630-31 (2007).



180 days of that original decision. But, she also said that it could be read to mean both the actual original pay setting decision and any subsequent payments of the discriminatory wage. In practice then, the ambiguity of this term becomes readily apparent even though, at first glance, the phrase appears straightforward. Justice Ginsburg concluded the latter definition of the term had been adopted by the Supreme Court in past cases and should be applied here, but the text of the statute as written at the time certainly did not demand one reading or another.

Ginsburg also criticized the majority's reliance on one of the Court's past decisions, *Lorance v. AT&T Technologies, Inc.*<sup>4</sup> as a basis for the conclusion that it reached in *Ledbetter*. As a closely analogous case, *Lorance* also involved a claim of sex discrimination under Title VII involving AT&T's seniority system that ultimately turned on the same statute of limitations question. In *Lorance*, the Court too concluded that the plaintiffs, by waiting several years after the initial alleged discriminatory act, were outside the applicable charging period and could not proceed with their Title VII claim. Nevertheless, as Justice Ginsburg explained in her dissent in *Ledbetter*, the majority's reliance on *Lorance* was "perplexing" because Congress had subsequently reversed the impact of that reading by amending Title VII to expressly allow for such claims as part of the 1991 Civil Rights Act. While the 1991 amendment only targeted discrimination in a seniority system, which was not at issue in *Ledbetter*, Justice Ginsburg felt the majority's opinion was at odds with what she saw as a clear directive from Congress, only 18 years earlier, for the Court not to take an "unduly restrictive" interpretation of Title VII. At the close of her dissent, noting that *Ledbetter v. Goodyear* was not the first time the Court had issued an overly "cramped" interpretation of Title VII (a direct reference to *Lorance*), she concluded with the following observation: "Once again, the ball is in Congress' court. As in 1991, the Legislature may act to correct this Court's parsimonious reading of Title VII."<sup>5</sup>

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<sup>4</sup> 490 U.S. 900, 109 S.Ct. 2261, 104 L.Ed.2d 961 (1989).

<sup>5</sup> *Ledbetter*, 550 U.S. at 661 (2007).

## Introduction: Lawmaking & Reaction Bills

Less than two months after this invitation to Congress from Justice Ginsburg, the House Committee on Education and Labor issued its report on the Lilly Ledbetter Fair Pay Act of 2007. As noted in its report, the express purpose of the bill was to “reverse the Supreme Court’s May 29, 2007, ruling in *Ledbetter v. Goodyear*, which dramatically restricted the time period for filing pay discrimination claims under Title VII and made it more difficult for workers to stand up for their basic rights at work.”<sup>6</sup> While discussing the Committee’s work on the bill and its view on the *Ledbetter case*, the report explicitly mentioned the above-cited quote from Justice Ginsburg, admonishing Congress to take action to correct what she believed was the majority’s incorrect reading of Title VII. Specifically, the report cited as at least a partial motivation for the bill as being, “She [Justice Ginsburg] explicitly called on Congress to reverse the Court’s decision: ‘the ball is in Congress’ court’.”<sup>7</sup>

After a relatively close vote in favor of the bill in the House, the bill stalled in the Senate during the 110<sup>th</sup> Congress following opposition from Senate Republicans and the Bush administration to the bill.<sup>8</sup> The Senate Judiciary Committee held hearings on the bill, but ultimately it never emerged from that committee for a vote on the Senate floor and eventually died with the conclusion of the 110<sup>th</sup> Congress. Following an expansion of the control of both the House and Senate after the 2008 election, and with a new Democratic President, the Lilly Ledbetter Fair Pay Act immediately reemerged at the outset of the new legislative session for the 111<sup>th</sup> Congress as Senate Bill No. 181. As one of the top legislative priorities for the new Congress, the bill was re-introduced in the Senate on January 8, 2009, was quickly passed in both chambers, and was signed by President Obama on January 29, 2009 as the first major piece of legislation to be enacted into law under the new President.<sup>9</sup>

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<sup>6</sup> H.R. 110-237.

<sup>7</sup> H.R. 110-237.

<sup>8</sup> See *New York Times*, headline “G.O.P. Set to Block Bill Easing Limits on Pay Discrimination Suits” 4/23/08.

<sup>9</sup> The legislative history for bill S. 181 can be found on the Thomas, Library of Congress website located at: <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:SN00181:@@@R>

The new provision amended 42 U.S.C. §2000e-5 such that an unlawful employment practice was deemed to have “occurred” whenever an “individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.”<sup>10</sup> Thus, the previously ambiguous phrase in the Code— “after the alleged unlawful employment practice occurred”—was given a more expanded definition to make sure a person similarly situated to Lilly Ledbetter could, in the future, proceed with a Title VII claim. Like the case with *Lorance*, Congress explicitly reversed the outcome of a Supreme Court case, by amending the underlying statute to adopt a broader, and more explicit reading of Title VII, thus preventing a similar outcome in future cases. Equally important is that not only did one of the Justices on the Supreme Court invite Congress to override what she felt was an overly restrictive reading of Title VII by the majority, but Congress also took notice of that invitation and cited to it in explaining the motivation behind this reaction bill.

### Overview

The subject-matter and focus of this dissertation concerns the interactions between Congress, the federal courts (with considerable focus on the Supreme Court), and to a lesser extent the Executive branch, through the mechanism of reactionary bills like the one just described. My thesis is that despite an institutional system of government that divides power and sets the branches in opposition to one another, a state-centric system of cooperative governance has developed in the United States over time that can be understood by, and exemplified within, these reactionary bills. The Lilly Ledbetter Fair Pay Act and the data presented in this dissertation suggest that this system of governance is built through an interbranch signaling system, with both the judiciary and executive playing a key intermediary role, that

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<sup>10</sup> PL 111-02.

has come to be relied upon by Congress in crafting and continuously reshaping the nation's statutory law.

Through an examination of how the branches interact in the context of reaction bills, the primary contribution of this dissertation is to develop a competing framework for understanding the policy-making process and inter-branch relations in the United States of America. This new framework relies on a motivating mechanism of institutional legitimacy and an enhancement to state authority held by governmental actors and realized through the production of good public policy. To meet these ends, the model assumes that these actors will engage in regular and ongoing cooperative acts as they interact with one another in the production of these policies, with an ultimate goal of enhancing the overall authority of the state. The contours of such a framework, however, lie in tension with two of the dominant models of policy-making that have been developed to date: (1) the pluralist, and (2) competitive, or political positivist, accounts of inter-branch relations. Thus, this dissertation presents itself both as a challenge to the notion that what passes for governance in America is largely the product of conflict and contestation among the main actors across the three branches of government and as an explanation for how change in the direction of public policy can come from, and be directed by, factors that are endogenous to the state itself.

Within this broader framework of governance and lawmaking, this dissertation attempts to address a number of general questions concerning the interactions between Congress, the federal courts, and the Executive branch and how each of these branches of government influence the development of statutory law. Specifically, the dissertation explores how often Congress responds to federal court decisions through reform legislation. Are there any detectable patterns or variability over time? Is Congress's attention focused largely on the Supreme Court, or does it respond with equal vigor to decisions by lower courts? Also, why does Congress react to certain cases and not others?

Theoretically, it could initiate a legislative response to almost any decision, yet from past research we know it only responds to a relatively small subset of cases through reform legislation (Eskridge 1991a; Henschen and Sidlow 1989; Meernik and Ignagni 1994). What are the reasons for selecting only certain cases? What role does the Court's power of judicial review play in this process, and might its application in these cases warrant a reconsideration of its legitimacy and importance in the American system? How does the American separation-of-powers system, a bedrock principle in the American government, possibly encourage this type of legislative and judicial behavior? Are the interactions between Congress and the federal courts in these examples largely driven by competition and contestation or motivated by a sense of cooperation and collaboration?

Each of these questions, in its own right, deserve serious scholarly attention, but in the aggregate they point to a few key puzzles that still exist concerning the functioning of these important institutions and the operation of the American State. Many scholars have come to understand the separation-of-powers framework as the defining feature of the American system of government. While the Constitution specifies how the general powers of government are divided between the legislative, executive, and judicial branches, "many of the details concerning the interaction among the branches and the daily functioning of the state were left unresolved" (Epstein and O'Halloran 1999, 5). The central puzzle to emerge, therefore, in studying the American system is how the state can be effective and responsive when its powers are divided among distinct branches and the details of how these branches are to interact are not specified in the Constitution.

For decades, much of the scholarship that sought to solve this puzzle condemned the separation-of-powers system, eventually concluding that only through responsible party government could the American State overcome gridlock, incoherent policy, and corruption (Key 1964; Schattschneider 1942; Wilson 1908; Ford 1898). More recently, however, scholars have shown that

even during periods of divided government when gridlock would be expected to be at its highest, the policy outputs from the government remain quite high (Mayhew 1991). In seeking to explain this phenomenon, much of the literature in this area has come to rely on a rational choice approach to show how the mechanism of *bargaining* between the branches can mediate much of the conflict generated by the separation-of-powers framework and result in coherent public policies produced with regularity (Cameron 2000). As I noted earlier, however, these conclusions are largely the product of studying the relationship between Congress and the President, and they are premised on a definition of “lawmaking” that is focused exclusively on actions within, and between, the legislative and executive branches. Lawmaking, however, does not end at the President’s desk. When the actions and impact of the judiciary and any subsequent responses to that by Congress are factored into the process, do the assumptions about the behavior and interactions between these branches still make sense such that rational choice can be understood as the best theoretical framework? If not, is there a different framework that can explain how the branches interact in an effort to govern the nation and produce public policies?

The nature of the separation-of-powers and checks and balances system implies that the different branches of government will interact with one another in unique ways and, in fact, scholars have long-studied this phenomenon with an extensive array of studies on the interactions between Congress and the Presidency/Bureaucracy (Snyder and Weingast 2000; Cameron 2000; Krehbiel 1998; Binder 1997; Ferejohn and Shipan 1990; Calvert, McCubbins, and Weingast 1989; McCubbins and Schwartz 1984). However, relatively less is known about the relationship between Congress and the Supreme Court. There certainly have been a number of important works on this topic (Epstein, Knight, and Martin 2001; Epstein and Knight 1998; Meernik and Ignagni 1997; Segal 1997; Epstein and Walker 1995), from which we have learned that Congress does regularly interact with the Court and it is typically done through process of legislation that modifies the underlying statutory framework (Meernik

and Ignagni 1997; Segal 1997; Eskridge 1993; Eskridge and Ferejohn 1992; Gely and Spiller 1992; Eskridge 1991a, b; Henschen and Sidlow 1989). Nonetheless, the picture is still incomplete in terms of *how often* Congress responds to the Court, the details behind these interactions, whether any such patterns hold up across time, and, most importantly, *why* Congress might choose to respond to certain decisions by the Court and not others.

The second puzzle to be confronted in this dissertation, therefore, is what reasons motivate Congress to respond to particular court decisions through reform legislation while leaving most cases alone. Past studies have argued for two distinct theories in explaining why Congress responds, commonly referred to as “coordinate construction,” or “case saliency” theory, and “rational choice” theory. Coordinate construction borrows from pluralism the idea that both individuals and groups, inside and outside of government, will use Congress and its ability to legislate to realize their own interpretation of the Constitution or a statute that was subject to an adverse ruling by the courts (Meernik and Ignagni 1997). The idea here is that content and outcome of certain court decisions will be more salient to particular groups or entities, which will cause them to petition Congress for some remedy mediating the unfavorable outcome. The second theory, rational choice, posits that both Congress and the Supreme Court will behave in a strategic fashion in an effort to maximize their own policy preferences (Spiller and Tiller 1996; Spiller and Spitzer 1995; Eskridge 1991a). Under the former theory, Congress will initiate reaction or reversal legislation when these various groups bring pressure upon them, and under the latter theory we would understand congressional action to be motivated based on a perceived opportunity to give effect to the policy preferences of members of Congress. Few of these studies, however, have included a more systematic accounting of reaction bills over an extended period of time, nor have they considered a more cooperative theory of interbranch relations similar to the cooperative/signaling approach proposed by Hausseger and Baum (1999). With a more comprehensive data set and additional explanations factored into the analysis, do the existing theories

that seek to explain the congressional/judicial relationship and the reasons behind reaction bills still make sense? This dissertation seeks to answer those questions.

Finally, for many decades now, one of the most active debates among judicial scholars has concerned the scope, and fundamental legitimacy, of judicial review. Since Alexander Bickel's (1962) charge that when courts exercise the power of judicial review they are operating as a "counter-majoritarian" force, it has been widely debated whether the courts, with unelected Justices, are entitled to thwart democratic acts of the people. The response to this charge has been wide ranging, varying from arguments that as long as courts operate within certain boundaries the power of judicial review remains legitimate (Arkes 1990; Bork 1990; Bobbit 1982; Ely 1980; Tribe 1988; Tribe 1978; Wechsler 1959), to arguments that the Constitution needs to be taken "away from the courts" (Tushnet 1999, ix; See also Whittington 1999; Graber 1998; Graber 1999; Fisher 1988; Ackerman 1991; Griffin 1996), to those who argue the courts' vigorous use of judicial review is necessary in any constitutional democracy, as it requires a "single, authoritative decisionmaker" (Alexander and Schauer 1997, 1379).

This dissertation offers a different justification in favor of judicial review and the courts' broader ability to review and rule on statutory meaning. Following an argument most fully articulated by Pickerill (2004), I concur that it is a mistake to accept the premise advanced by so many critics of judicial review that this power of the courts is an obstacle to democratic lawmaking. Instead, I suggest that Congress is not only likely to respond to a significant number of decisions by the courts based on either constitutional or statutory provisions, but also that the courts can (and do) play an invaluable role in initiating such responses and invigorating a political debate over the meaning of various laws. Despite Chief Justice Marshall's admonishment that it is the courts that "say what the law is"<sup>11</sup> practice has proven that, when it so desires, Congress is the ultimate authority on the final contours of any law. But,

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<sup>11</sup> *Marbury v. Madison* 5 U.S. (1 Cranch) 137 (1803).



in the process of interpreting or overturning laws, through the power of judicial review, I also argue that the courts can supply Congress with important pieces of information that makes its role in the legislative process not only legitimate, but invaluable.

*Models of the American State*

In addressing these questions and topics, the dissertation situates itself in tension with two of the main theories of American politics that seek to explain how the state functions and remains legitimate within a system defined by a separation-of-powers framework. One of those theories, rational choice, also known as political positivism, places at its core the idea that a dynamic and competitive tension among the branches, which are themselves made up of rational, policy-maximizing individuals, explains the behavior of government actors and overall lawmaking process in America (McCarty, Poole, and Rosenthal 2005; Cox and McCubbins 2005; Cameron 2000; Binder 1999; Coleman 1999; Krehbiel 1998; Mayhew 1991). The theory suggests that despite a set of institutions made up of atomistic and preference-maximizing actors, the separation-of-powers system can result in coherent policies being produced by requiring these actors and institutions to interact and bargain with one another over policy (Cameron 2000). The product of those interactions, while often contentious, can be quite fruitful and result in new laws and policies being produced at regular intervals. Thus, within this literature, the idea of “interbranch bargaining” (Cameron 2000, 3) takes a central and dominant role in a theory of American politics.

Recently, the subject of the state has recaptured the focus of much of the scholarship in political science, resulting in several distinct theories of the state and the role it plays in American political life. The second concept to be challenged in this dissertation falls into one of these categories, and while the range of approaches within this literature is broad it has been characterized as the “Citizen-Responsive State” model (Greenberg 1990, 17). One of the principal paradigms within this theory, pluralism, speaks

both to the democratic legitimacy of the American system and the process by which the state takes a particular course of action. In contrast to the view that the American system must be majoritarian and legislatively-centered to be legitimate, pluralism posits that there should be no hierarchical arrangement among the competing institutions, that minorities or groups should rule, and that diversity in political representation is normatively a good thing (Peretti 1999). For the state to function and survive, the theory suggests that public officials must respond to the demands of popular majorities or vocal minorities “as the price for their retention of power or office” (Greenberg 1990, 18). Thus, in understanding how the state functions, the principal relationship that is the focus in this model is that between the citizen and the public official, and legitimacy is derived from those state actors following the commands of the public.

The cooperative/state-centric model posited in this dissertation rejects both models, not because their ideas for how the branches can interact and develop public policies, which in fact does happen with some degree of regularity, but because of the universalist paradigm that both approaches advance. Positive political theory envisions state actors in a near-constant state of competition and contestation, as political actors within and across each of the branches battle over their preferred policy outcomes. Pluralism, in contrast, views the behavior of elected or appointed officials as being constantly driven by the desires and ongoing machinations of the public, whose shifting opinions must be given effect for the state to remain legitimate. What the data on reaction bills and the focus on this aspect of inter-branch relations demonstrate is that the above-described models go too far in seeking to advance the view that the behavior of political actors that they seek to describe is ever-present in the American State. The cooperative/state-centric model not only lays out a competing framework for understanding how policy is developed and how the branches interact, but equally important is its effect of undermining the universalist claims of the competing models just described.

Although the frequency by which reaction bills occur and the behavior of the political actors in the context of developing this legislation may not constitute conclusive evidence for a cooperative theory of policy making and inter-branch relations, at a minimum this phenomenon suggests a cooperative mechanism must be on par with the competitive dynamic assumed by political positivists. Such a conclusion is based on the fact that the cooperative efforts meticulously detailed in this dissertation would not be sustainable in an environment of unrelenting competition. Likewise, but from a different angle, inter-branch cooperation also undermines the hegemonic claims of pluralists who assert that policy-making is always the product of public opinion motivating the behavior of political actors and, in turn, the state itself.

The conclusion reached at various points throughout this dissertation is that policy change can, and often does, come from a strong and ever-present desire to govern legitimately and enhance state authority that is held by the state actors themselves. This goal can be met by producing good public policy, which is defined by policies that are clear, stable, predictable, equitable, and just. When Congress regularly revisits laws, after input and interpretation by agencies and the federal courts, their reassessment and refinement can further the goal of producing good public policy and, in turn, enhance their own legitimacy and authority. Each of these observations, which manifest themselves in my own state-centered theory of cooperative governance, seek to temper the universalist claims held by both pluralists and political positivists.

### Chapters

In the chapters that follow, I ask and subsequently analyze two key questions that address the topics discussed above within the context of studying bills produced by Congress that react to federal court decisions. The first of these questions takes a more macro-political perspective and asks: do reaction bills in Congress occur with enough frequency, and at regular intervals, to warrant an expanded

definition of “lawmaking” and a new (or modified) framework for how lawmaking, and in turn governance, works in America? As noted at the outset of this dissertation, considerable attention has been devoted to understanding the nature of lawmaking in America, but much of that literature operates from a rational choice framework with an almost singular focus on the behavior and actions of only two branches of government, Congress and the Presidency. Accepting for the moment that reaction bills are significant enough to warrant serious attention, if these assumptions are applied to the reactionary bill process, do they adequately explain the motivations behind the behavior of members of Congress and the courts in this arena as well? If not, does this process suggest that a different theoretical frame is appropriate for explaining how the branches interact and the lawmaking process unfolds?

The second question examines the reaction bill process itself from a more microcosmic perspective and asks: why does Congress select certain cases to respond to while leaving others alone? For at least the past several years, the lower federal courts actively manage over 300,000 cases on an annual basis.<sup>12</sup> Yet, Congress only responds to a small subset of these cases. What is it about the set of cases that do generate a legislative response that lead to this result? Do they share any common features that would allow for a causal story to be told and result in the ability to predict future instances of reaction bills? If such common features exist, does this contribute anything to the broader scholarly understanding of how the branches interact with one another and exercise their duties of governance?

To assess these questions, I deploy an analytical framework that draws from the so-called new institutionalism literature and applies an interbranch perspective in studying both Congress and the federal courts. Generally speaking, an interbranch perspective operates from the premise that policy

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<sup>12</sup> All case filing data is taken from Reports of the Proceedings of the Judicial Conference of the United States, Annual Report of the Director of the Administrative Office of the United States Courts (“U.S. Judicial Conference Reports”) (1940-2004).

making in the United States is the product of a potentially infinite set of interactions among “separated institutions sharing power” (Neustadt 1990, 34). A secondary premise is that the product of this division of power is a dynamic set of relations among each of the branches that can be unique both across different issue areas and over time (Shapiro 1964; Lowi 1972; Barnes 2004). From these two assumptions, which most would find to be non-controversial, scholars in this area have developed several divergent types of analyses to better understand these relationships and the resulting policies that emanate therefrom. In this dissertation, I intend to borrow from a number of these different analytical tools in order to better understand the nature of the interactions between Congress and the federal courts, what public policies emerge from these interactions, and what the broader process says about the manner in which governance takes place in the United States.

The data relied on for much of the dissertation are based on two unique data bases I created that are designed to map out much of the terrain concerning reaction bills and their accompanying court cases. The first of these two data sets focuses on the legislative activity within Congress itself. Beginning in 1985 and continuing through until 2008 (the 99<sup>th</sup> through 110<sup>th</sup> Congresses), I analyzed all committee reports from both the House of Representatives and the Senate that were available in electronic format<sup>13</sup> in search of what I have referred to as “reaction bills.”<sup>14</sup> As a general matter, a reaction bill or law refers to the process wherein Congress seeks to reverse, modify, or codify a decision,

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<sup>13</sup> For the period from 1990 through 2008, this included all committee reports that were published by the various committees in the House of Representatives and the Senate regardless of whether they became public laws or not. Much of the information for this period was downloaded directly from the Library of Congress’s website, known as “Thomas.” This was supplemented with committee reports that were available through LexisNexis Congressional Universe and Westlaw. From 1985 through 1989, a complete set of electronic versions of the committee reports is not available. The best available resource that has some of the committee reports is the United States Code Congressional and Administrative News (U.S.C.C.A.N.) produced by Westlaw, which contains complete committee reports for what they classify as significant bills that were enacted into law.

<sup>14</sup> I adopt this phrase from the work of Henschen & Sidlow (1989). Subsequent scholarship has more often described this process as the “override process” (see Eskridge 1991; Barnes 2004). While these phrases largely speak to the same process, I adopt what I consider to be a more inclusive and accurate term of “reaction” because while these bills often seek to reverse or overturn federal court decisions, this is not always the case. A certain segment of these bills, however, based on my understanding of past research and my own studies, simply codify the exact interpretation of a statute given to it by the courts or some close variant thereof. The connotations that flow from the term “override” would seem to exclude this part of the process, which I believe to be equally important.

or multiple decisions, issued by the courts. Often, the reaction bills target a specific statute that has been interpreted by one or more federal courts. Additionally, however, reaction bills also can involve disputes between Congress and, typically, the Supreme Court over the scope and meaning of constitutional text. To qualify as a reaction bill, the text of the bill or its accompanying legislative history (as identified in the committee reports) must specify that at least part of the bill was prompted by, and designed to reverse, modify, or codify a decision or series of decisions issued by the federal courts. Added to this original data set is a list of “override bills”<sup>15</sup> as identified by William Eskridge in his path-breaking article on this same topic, titled *Overriding Supreme Court Statutory Interpretation Decisions* (1991). Eskridge, utilizing a similar process, identified all new public laws for each Congress from the 90<sup>th</sup> through the 101<sup>st</sup> (1967-1990) that reversed one or more federal court decisions. While his data collection techniques and limitations varied in some important ways from my own (discussed in more detail in chapter 2) the combination of his data with my data set offers an approximate 40 year window for exploring congressional activity that can be classified as reaction bills.

In identifying the different reaction bills, I recorded what case or set of cases is being reversed, modified, or codified within the bill. As a corollary to this main data base, I developed a second data base that includes all of the Supreme Court’s statutory decisions for a period of ten terms, between 1986 and 1995. Even though the primary focus of the dissertation is on reaction bills in Congress, it is necessary to look at the court cases themselves to have a complete picture of this process. Logically, there must be some feature germane to the court decision itself that is prompting a response from

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<sup>15</sup> Eskridge relies on the term “override” in describing the bills and public laws he identified, which is somewhat more than just a semantical difference with my own term, “reaction bills.” As the term implies, he only identified those bills that were designed to “overrule,” “modify,” or “clarify” one or more court decisions. As a result, his analysis did not identify those bills that codified some of the language from one or more cases. Thus, in addition to some of the other data limitations he faced, his set of cases is necessarily smaller than my own because he was not focused on this final category of cases that I have utilized in my own analysis. I analyzed the relevant committee reports he identified in his own research to independently verify the coding decisions made by Eskridge and his research team. In some situations I was able to locate some additional cases that fell within my coding categories of “modify” or “codify.” However, this was not a systematic analysis and should not be considered a comprehensive list of all reaction bills during the period from 1967-1984.

Congress through a reaction bill. In other words, it is improbable to think that what typically happens is members of Congress introduce and revise particular bills and then, at some point later in that process, go out and determine if a bill might have the effect of reversing or modifying one or more court decisions. While I cannot foreclose the possibility that this happens on occasion, the amount of resources, both in terms of labor hours and money, that it would take for Congress to do this on a regular basis for all the bills produced in each Congress is beyond realistic. Thus, in my efforts to discover why Congress responds to certain court decisions and not others, it is important to analyze the features of all the cases to determine if there are any common characteristics among the cases that do receive a congressional response.

I focus only on the Supreme Court's statutory decisions because, as is discussed later in Chapters 2 and 3, the overwhelming amount of reaction bills deal with statutory (as opposed to constitutional) matters, and statutory cases represent about one-half of the Supreme Court's annual docket.<sup>16</sup> Additionally, only Supreme Court cases are included in this data set for a number of reasons. First, I am most interested in examining the relationship that Congress has with its co-equal branch, the Supreme Court, rather than its relationship with the lower federal courts that it had a hand in creating. Second, the amount of data available on the Supreme Court is far more comprehensive than the lower federal courts, which allows for a number of different hypotheses to be tested that could not be examined if the focus was on the lower federal courts. Third, the plurality of the reaction bills produced in Congress are responsive to one or more Supreme Court decisions, making it the largest category (among the various levels of federal courts) of case origins to generate a legislative response. Finally, the data on the Supreme Court is simply more manageable. In recent years, the Supreme Court has formally decided

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<sup>16</sup> Data on the number of statutory cases and the Supreme Court's total annual docket is derived from The Original United States Supreme Court Database, by Harold J. Spaeth, available at: <http://www.cas.sc.edu/poli/juri/databases.htm>.

less than 100 cases per term; whereas, the lower federal courts are currently disposing around 300,000 cases each year.<sup>17</sup> Managing that volume of data is beyond the scope of this dissertation.

Chapter 1 begins with a discussion of the theoretical terrain that the dissertation attempts to navigate. The focus here is on examining the overall lawmaking and governance process in America and how past scholarship in this area has attempted to explain how the branches interact with one another and produce policies in light of the defining institutional feature of the United States—the separation-of-powers framework. I challenge the assumptions underlying these different theories and models that, in part, conclude that what passes for governance is often the “product of pulling and hauling, haggling and bargaining among the three branches” (Cameron 2000, 3). In its place, I offer a new set of assumptions and a new framework for understanding governance, through the lens of lawmaking, and how the branches interact with one another in that process. At the core of this framework is the idea that a system of communication and a sense of cooperation can be understood as the basis for what I label as “ordinary governance” in the United States.

Chapter 2 seeks to establish that congressional reaction bills are frequent enough and impact an adequate number of significant pieces of legislation to justify their study and a reassessment of the theoretical frame used in America for explaining the lawmaking process. I begin by detailing the method by which reaction bills were identified followed by an argument in favor of using committee reports as the key source of information for making these identifications. I then analyze how often Congress actually responds to judicial decisions and how that compares to the total amount of legislation produced by Congress. On the surface, this analysis shows that reaction bills typically represent less than five percent of total legislative activity in any given Congress. Naturally, one may ask: why should

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<sup>17</sup> All case filing data is taken from Reports of the Proceedings of the Judicial Conference of the United States, Annual Report of the Director of the Administrative Office of the United States Courts (“U.S. Judicial Conference Reports”) (1940-2004).



anyone care about such a small percentage of congressional activity? As I argue in this chapter, however, the importance of reaction bills cannot simply be told through this one simple measurement. Much of Congress's activity is what other scholars have referred to as "minor" legislation that is more trivial in nature and a much smaller impact on the life of the nation.

In contrast, as I suggest in chapter 2, a sizeable number of reaction bills concern more important pieces of legislation that have a greater impact on the public policy of the nation. When reaction bills are measured against legislative activity on these more significant bills, their frequency is correctly understood as being much higher. Additionally, I demonstrate through various examples that the behavior of both members of Congress and the federal courts are influenced by this process. By examining judicial decisions, it is clear that members of the Supreme Court, for example, are cognizant of the fact that Congress might overturn or modify their decision. Likewise, members of Congress, as documented in the committee reports that are attached to the various pieces of legislation, recognize some of the boundaries set upon them by the federal courts as they adjust current laws or craft new ones. The degree to which the behavior of these actors is modified as a result is difficult to quantify, but it is evidence that such concerns enter the decision-making process of these individuals. For these and other reasons discussed in chapter 2, I argue reaction bills are worth further exploration and warrant a new theoretical framework for governance in America.

Chapter 3 takes an in depth examination into the reaction bills produced by Congress. The discussion here focuses on an extensive analysis of a number of different features associated with the reaction bills. I explore in detail items such as the different committees involved in producing reaction bills, a discussion of the most common policy types (i.e. distributive, regulatory, etc.) that are involved in reaction bills, and a listing of the different provisions of the United States Code impacted by these bills. I also analyze some political characteristics of these bills, such as their legislative "success" rate and

whether more or less appear during periods of divided government. One of the other questions examined in this chapter also asks how long after a case is decided does it typically take for Congress to generate a response? Do most of the bills represent attempts to override one or more decisions, or are most of them more subtle modifications to court rulings or even codifications of those rulings? Finally, I quantify and then discuss the implications that result from the number of times Congress, in the committee reports, discusses any admonishments or invitations from federal judges and Justices to change a particular statute. This final topic represents an important transition into thinking about the reasons why Congress may respond to a court decision (or line of decisions) and what that says about governance in the United States.

With much of the underlying details on reaction bills established in the prior chapters, Chapter 4 transitions to a discussion of some of the underlying Supreme Court cases that generate reaction bills in Congress. In Chapter 3, I argued there is considerable evidence that members of Congress are looking to information supplied by the other branches in determining what direction to take particular laws, but is there any evidence that the Supreme Court is complicit in attempting to communicate information to Congress? In an effort to uncover any such evidence, I begin with the concept of “judicial signaling,” which is the idea that judges/justices write into their opinions concerns they have with their decisions with directions to Congress that some corrective action must be taken with the goal, as some have argued, to achieve good public policy even at the expense of their own policy preferences. To discover the frequency with which any signaling occurs, I develop, and introduce in this chapter, a comprehensive database of all the Supreme Court’s decisions between the 1986 and 1995 terms. After discussing the development of this database, the chapter details various examples of judicial signals, the frequency with which they occur, where such signals are located in the decisions (majority, concurring, or dissenting opinions), and the types of justices who issue such signals. The frequency with which these

signals occur represents an important transitional point into considering the various reasons why Congress may react to Supreme Court decisions, which question is taken up in the next chapter.

Chapter 5 then analyzes much of the combined data found in the congressional reaction bill and Supreme Court decision databases through several statistical models in order to better understand why Congress responds to certain Court decisions and how the process of responding to certain decisions suggests the outlines for developing a theory of governance. At the outset of this chapter, I describe much of the existing literature and theories surrounding the question of why Congress initiates responsive legislation to Supreme Court decisions. Relying on my data of around 40 years of reaction bills and Supreme Court decisions for an overlapping ten-year period, I am then able to develop several empirical models designed to test several hypothesis stemming from these distinct theories. The dependent variable in each of the two models was a dichotomous measure of: (1) whether or not the Court decision was the subject of a reaction bill by Congress, regardless of whether or not the bill passed Congress; or (2) if the decisions were the subject of a reaction bill that became a public law. Several competing hypotheses are then tested in a series of statistical models in an effort to determine whether a more cooperative signaling mechanism is motivating these reaction bills or other theories, such as case saliency theory or rational choice theory, offer the most compelling reason for understanding why Congress responds to particular Supreme Court decisions. Relying on a concept first developed by Lawrence Baum and Lori Hausseger (1999), I coded each case for the presence of what I refer to as “signals” by the Justices to Congress inviting a legislative response. Other variables were also coded to capture the impact of the Solicitor General (representing the Executive Branch) on the case, what effect a State losing the case may have, if the number of *amicus curiae* in the case impacts the process, along with several other variables designed to test the traditional case saliency or ideological hypotheses. The results of this analysis are intended to offer further quantitative evidence in favor of the idea that

reaction bills are best explained through a framework of interbranch signaling as opposed to rational choice theory or the case saliency approach.

In the final chapter, Chapter 6, I seek to bring back together all of the evidence supplied and analyzed in the prior chapters to reexamine the level of support for the framework of lawmaking and the system of governance first outlined in Chapter 1. For several centuries now, scholars have sought to understand how the United States government functions and produces public policies in light of an institutionalized system that subdivides the traditional powers of government into three distinct branches and then sets those branches in opposition to one another. The explosion of scholarship over the last few decades within the framework of political positivism has offered a compelling theory and narrative for understanding the behavior of actors within the branches and the product of their interactions. My own dissertation does not reject the foundation upon which much of this work is built; rather, I argue that rational choice theory and the citizen-responsive state model do not, and cannot, fully explain how governance ordinarily takes place in the United States. While rational choice theory certainly offers a persuasive framework for understanding some institutional and interbranch behavior, I argue that the evidence supplied in this dissertation points to a more comprehensive framework for explaining how the branches work with one another to govern the nation, one that is built, in part, on a system of “interbranch signaling.” Similarly, while pluralism offers a compelling case for showing how government actors are responsive to the demands of the citizens in taking a particular course of action, I argue that the citizen-responsive state model leaves out, to its detriment, the important role of actors within the state itself and how they influence the direction of public policy.

### Conclusion

One of the many consequences stemming from the erosion of federalism in the 20<sup>th</sup> century and the rise of a strong national government in its place has been the increasingly large number of tasks

taken on by the federal government. As noted by Ripley and Franklin, “the sheer volume and technical complexity of the work is more than Congress with its limited manpower can manage alone” (1980; 16). To meet this challenge (among other reasons), Congress, many years ago, began the practice of delegating some of its authority to the other branches, primarily the Executive branch, to help manage the workload. Many prominent scholars have been deeply critical of Congress’s delegation of power arguing that it undermines the rule of law and results in public policies that are wrapped in “shrouds of illegitimacy and ineffectiveness” (Lowi 1969, 127). This now ubiquitous argument has been labeled by George Lovell (2003, 4) as the “democratic baseline framework” as it assumes, among other things, that the presence or absence of electoral constraints on government officials determines whether the policies produced by a particular branch are democratic.

One of my objectives in this dissertation is to suggest that despite the merits of these critiques, there is reason to be optimistic about this decision to delegate. As exemplified by the quote from James Madison at the outset of this chapter, any new law, even when crafted with a meticulous attention to detail, requires its meaning to be “liquidated and ascertained by a series of particular discussions and adjudications” (Madison 1961; 197). The written word is, by definition, indeterminate in its meaning, and in recognizing this fact, we can find theoretical support for accepting a role to be played by executive agencies and the federal courts in using some of their delegated powers to better ascertain the meaning of a particular law. Second, what a theory of interbranch signaling and the supporting empirical evidence suggest is that even though Congress delegates some of its powers to agencies and the courts, a mechanism for monitoring at least some of that activity has developed, and Congress can choose to act if it disagrees with a determination made by one of those agencies or the courts. Thus, my argument is that if the decision to delegate did indeed sacrifice some of the democratic legitimacy of our system, at least some of that is recaptured in the end by Congress reasserting jurisdiction over the contours of any particular law.

The dissertation also seeks to prove that Congress regularly monitors what the other branches do with the delegated powers, particularly the courts, and they react to those decisions with new legislation, thus reconstituting their duty to legislate. The court decisions likely come to the attention of Congress through a variety of mechanisms, including: (1) citizens, businesses, or labor groups directly impacted by a case, or set of cases, who then lobby members of Congress; (2) interest groups with a stake in the underlying policy matter; and (3) elite actors in society monitoring the general state of the law in a particular area. The motivations of these various interests in bringing a case or line of cases to the attention of Congress are certainly mixed, but they all share a common goal of desiring to influence the ongoing development of a particular law following a court decision(s).

The data presented herein points to the fact that the courts, and to a lesser extent the executive branch, are aware of congressional monitoring and the actors in those branches deliberately seek to facilitate this process by signaling to Congress areas in the law that warrant additional attention. In turn, Congress picks up on some of those signals and acts to revisit a particular statutory framework in light of a recent court decision on that statute. This not only shows an important role for the courts to play in developing the nation's statutory law, but more broadly paves the way for thinking about how the branches can work together, in a system of separated powers, to govern the nation.



# Chapter 1

[T]he preservation of liberty requires, that the three great departments of power should be separate and distinct.

—James Madison, Federalist No. 47

Most students of American politics begin their exploration of the United States Government with a detailed history of the Founding Era and the original development of the U.S. Constitution. The focus of the discussion and readings on this topic invariably hone in on one of the central concerns that dominated the thinking at the time and served as one of the main guiding principles in the development of the Constitution—the fear of tyranny. Evidence of the primacy of this fear runs abound in documents from this era. Perhaps the most famous and important set of writings from this time, *The Federalist Papers*, devotes much of its energy to outlining the corrupting influence of power, especially when it is concentrated within one king or dictator, and ways to overcome this corrosive force in politics. For instance, in *Federalist No. 47*, Madison states: “[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands...may just be pronounced the very definition of tyranny” (Madison [1787] 1961, 269). The *Federalist Papers*, naturally, advocate on behalf of the newly crafted Constitution of 1787 as the most effective remedy for combating this infectious virus of tyranny.

## The Separation of Powers

While there are numerous provisions within the Constitution designed to upset the formation of a tyrannical state, one of the key features advanced by *Publius*,<sup>1</sup> and what many scholars subsequently have come to describe as the “two pillars” of the American State, are the mechanisms known as “federalism” and the “separation of powers” (Cameron 2000, xiii). Although neither term is explicitly

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<sup>1</sup> This was the penname of the authors of *The Federalist Papers*: John Jay, Alexander Hamilton, and James Madison.



defined or discussed in the Constitution itself, these two principles served as bedrock ideas for the new Constitution and the emerging American State. Both of these features remained robust for many decades thereafter in the American system; however, by the close of the New Deal era, federalism had largely been cast into the background of the American system in lieu of a strong and vigorous national government. The 20<sup>th</sup> century and the rise of the modern American presidency also represented a distinct assault on the second pillar, the separation-of-powers system, but unlike the erosion of federalism, this system withstood the attack and remains viable to this day. Not only has it survived, most scholars now appropriately recognize the separation-of-powers framework as “the dominant principle of the American political system” (Wood 1969, 604).

The separation-of-powers model represented a clean break from the tyrannical form of governance that had dominated so many European nations at the time of the American founding, and for the most part over the past 220 years or so it has worked remarkably well in keeping despotic rule at bay. The model, however, creates a unique set of challenges for the American State—challenges that are largely distinct from our European counterparts—when it comes to governing, which is *the* central role of any political entity. The separation-of-powers system is built on one central principle—divide the main powers that any one government would ordinarily possess among two or more bodies (in the case of America, three branches) that are separate and distinct from one another but each performing a critical role in running the government as a unified entity. In conjunction with other features built into the Constitution, such as specifying different procedures by which individuals can ascend to the various offices, providing each office with a distinct constituency among the public, and formalizing procedures through which each of the bodies can partially check the power of one another, despotic rule would, in theory, have too many hurdles to overcome.

## Chapter 1: Ordinary Governance: A Framework for Lawmaking in America

As a means of preventing tyranny, the system has worked well. Nonetheless, it creates its own set of obstacles for any State when it comes to performing its central duty—*governing*. With power divided and the branches set in tension with one another, passing, enforcing, and interpreting a new law, for example, takes on a magnitude of difficulty several times greater and more complex than would be the case if the power to govern was located in one body or individual. One of the central problems, therefore, that scholars and students have been trying to solve since the formation of the current American State in 1787, is how the state performs its duty of governing in light of the division of power and institutionalized conflict built into the American Constitutional system?

### *Democratic Legitimacy: The Counter-Majoritarian Difficulty*

The separation-of-powers framework created a third independent judicial branch centered in the Supreme Court that not only furthered the goal of dividing power but the Court, in and of itself, was also a direct constraining force on tyranny. The idea was that even in a democratic system the majority must be told “No” on occasion so as to prevent tyrannical rule, and the Court, with its life-tenured and independent justices, was the ideal body to accomplish this task. The Court, however, through the power of judicial review, has come to be perceived by many commentators as its own unique threat to the legitimacy of the American system based on a separate set of core values centered on “majoritarian rule, electoral accountability, and legislative supremacy” (Peretti 1999, 189). Well summarized by a leading scholar on the Court, Professor Siegan, who stated “[t]he United States Supreme Court is an unusual institution for a nation that proclaims its dedication to democratic processes” (Siegan 1987, ix). As just noted, the particular concern here by numerous scholars and commentators has been the Court’s power of judicial review and the ability of this body of unelected judges, exercising this power, to overturn the “democratic will of the people.”

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Despite its complete absence from the text of the Constitution, the power of judicial review has consistently occupied a central space in the authority of the federal courts and their role as a coordinate branch in the U.S. government. While the existence of this power has been contemplated since the founding, receiving attention in Alexander Hamilton's *Federalist No. 78* and being more formally institutionalized in the landmark case of *Marbury v. Madison* (1803), it came under withering attack in the mid-20<sup>th</sup> century largely stemming from Alexander Bickel's widely cited book, *The Least Dangerous Branch* (1962). In charging the Supreme Court's power of judicial review as a "counter-majoritarian force," Bickel (1962, 16) honed in on the central critique that has always plagued the Court and its judicial review authority—the notion that the institution and its primary power are, at their core, anti-democratic. For a nation and system of governance that revolves around the principle of democracy and, allegedly, the notion of majority rule, this indictment by Bickel has potentially devastating consequences. If we are to assume that majoritarian rule is the foundation to our democratic system, the Court's power of judicial review and its independent ability to interpret the meaning of statutes arguably undermines this entire apparatus. This naturally leads to the fundamental question of what, if any, role the courts should play in the American system of government in shaping and crafting public policy?

The focus of this chapter, therefore, begins with the primacy of this fear of tyranny that the American Constitution is designed to abate and two of the key institutional features implemented to counteract this problem—the separation-of-powers framework and an independent judiciary. While these two systemic features are important checks on tyrannical rule, they themselves potentially create problems in their own right centered on the ability of the American State to govern and the role of the courts in that governing system. In particular, therefore, the chapter addresses two questions opened up by the aforementioned features, specifically: How is the American State governable with power divided across three distinct branches, each set in opposition to one another, and how does the state

maintain fidelity to the principle of democratic rule when one of these branches, the courts, is given authority to influence public policy but are themselves made up of unelected officials not directly accountable to the people?

The following sections first present a historical overview of how the past scholarship has confronted these two questions and the consensus that has been developed to date. I then provide some critiques of the theoretical frames and models produced by scholars seeking answers to these questions, with a particular emphasis on how best to understand “governance” and the role of the judiciary in making public policy. At the conclusion of that analysis, I offer a new framework of lawmaking and ordinary governance that departs from many of the core assumptions to date explaining interbranch relations and the role of the courts in the development of public policy.

#### *Historical Perspectives on the Separation-of-Powers System*

Given the apparent obstacles that a system of separated powers presents in terms of governing a nation, much of the early political science scholarship and theories about the American government, beginning in the late 19<sup>th</sup> century, viewed the separation-of-powers system not as a feature to be commended but rather as the source of division, gridlock, and corruption in the American State. The heart of this concern was captured by then-political scientists, and future-President, Woodrow Wilson, when he argued “you cannot compound a successful government out of antagonisms” ([1908] 1960, 60). The foundation for much of this view can be attributed to the landmark treatise, *The Rise and Growth of American Politics* (1898), published by Henry Jones Ford. Ford argued the self-interested motives of the Founders helped create a system, with the separation of powers at its core, that was helplessly fragmented, incoherent, and corrupt. Ford’s solution for remedying what he perceived as the mess created by the Founders was a strong, disciplined party system.

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The importance of a strong party system, and other related themes discussed by Ford, was later elaborated on extensively by prominent political scientists throughout the 1940s through 1960s. Towering scholars such as V.O. Key (1942) and E.E. Schattschneider (1942) produced several seminal books calling for this responsible party government. Later scholars such as Robert Dahl (1956), attacking Madison's political theory, and Richard Neustadt (1960), reclassifying the source of the President's power, would continue this same tradition first established by Ford. All of this scholarship, which came to be referred to as the behavioral synthesis, can be unified by its critique of the separation-of-powers system and how the state overcomes the structural limits imposed on it by this framework, with a particular emphasis and praise on strong parties.

For many decades, there were obvious reasons to support the consensus developed by much of this scholarship. It is readily apparent, even to a casual observer, that performing all the tasks that any complex organization, like the United States Government, is required to do becomes far more difficult when the power to make decisions is divided between two or more individuals or entities rather than being consolidated within one person or one body. Also, while split party control had been a regular feature in the American government following the rise of the modern party system in the 1820s and 1830s, it was less common than it is today and it could justifiably be seen more as an exceptional, rather than a regular, feature of the American government. Nonetheless, in the post-World War II Era that situation changed dramatically, as divided government subsequently became the norm. Between 1945 and 2008, Congress and the Presidency were simultaneously controlled by members of the opposing political parties nearly 60% of the time, including a twelve-year period from the early 1980s through the first part of the 1990s consecutively marked by divided government. Yet, despite the constant division of authority between the two main political parties, the United States Government continued to govern and, during this time, emerged as the lone superpower in the world. In light of the existing theories on the separation-of-powers framework, however, there was no theoretical basis to explain this

phenomenon as most of the scholarship up until the 1980s had concluded that divided government would result in gridlock, incoherent policies, and, in turn, a breakdown in governance.

In light of a mismatch between existing theories and the data emerging from decades of divided government, an explosion of scholarship on American political institutions, beginning in the 1970s, emerged to challenge both the normative and empirical conclusions of this earlier line of thinking that had so strongly critiqued the separation-of-powers system. In its place, numerous scholars began to argue, and prove, that periods of divided government can be just as productive, in terms of the amount of legislation produced, as times of unified government (Mayhew 1991), that at least some voters tend to prefer divided government and deliberately vote to ensure its existence (Alesina & Rosenthal 1995; Fiorina 1996), and that actors across the branches coordinate some of their activity in order to influence the other bodies and the direction of various policies (McCubbins, Noll, and Weingast 1987; Calvert, Moran, and Weingast 1989; Eskridge 1991a, b; Krehbiel 1996, 1998; Cameron 2000). David Mayhew's book, *Divided We Govern* (1991), perhaps more than any other single piece of scholarship, represented a direct challenge to much of the scholarship on the separation of powers that had existed up to that time. In demonstrating that the amount of significant legislation produced during periods of both high and low activity in no way correlated with the presence of unified or divided government, Mayhew's thesis directly challenged the notion that separating powers in the government would only result in gridlock, delay, and incoherent policies. To understand the intellectual foundation for much of this work, however, it is necessary to briefly step back and examine the underlying theory that would eventually come to drive many of these models of institutional behavior and governance.

### Rational Choice Theory

Following the pathbreaking work of David Mayhew (1974) and Richard Fenno (1973), scholars, beginning in the 1970s, fundamentally altered our understanding of the behavior of Congress and its

members, which would also eventually impact the study of the behavior of the President (Cameron 2000) and the Supreme Court (See Segal and Spaeth 1993, 2002; Segal 1997). Many of the models that were developed during this time frame were based on what has come to be known as rational choice theory, which itself is based on several guiding principles. Once the central assumptions driving rational choice theory are accepted, the theory provides an array of building blocks for constructing models to explain the behavior of different actors across the three branches, and more importantly, the institution of study as a whole. As noted by Charles Cameron (2000), rational choice theory entails three fundamental assumptions, which are discussed below.

The first assumption, what Cameron labels as the *actor assumption*, posits that the aggregate behavior of any social system is the product of the behavior of individual actors. Obviously, for any particular body like Congress to take an action, it requires many individuals to first act on their own. Thus, if social scientists can determine how individual actors behave this should correlate with the aggregate behavior of the institution of study as a whole. Second is the *intentions assumption*, specifying that individual behavior is motivated by one's own personal preferences, goals, and constraints. The individual actors within the system, it is assumed, act deliberately to maximize their preferences in light of the constraints they must operate within. Finally, the *aggregate assumption* specifies that it is the interaction of these different intentional policy-maximizing individuals that explains the aggregate behavior of the system as a whole (Cameron 2000, 71-72).

The strength of rational choice theory led to a rapid expansion in scholarship focused on building models that would explain Congressional behavior, and it would also eventually shape much of the literature on presidential and agency behavior and that of the Supreme Court as well. This new group of scholars, often referred to as rational choice, or "new" institutionalists, developed various models explaining congressional behavior and institutional structures, ranging from the distributive

model (Weingast and Marshall 1988) to the informational model (Krehbiel 1991) to the party-cartel model (Cox and McCubbins 1993, 2005). Related analyses identify congressional preference as based on the policy outcomes preferred by the median participating member, be it the majority party (Aldrich 1995; Aldrich and Rohde 2001), chamber floor or Senate cloture pivot (Krehbiel 1998), or policy-controlling committee (Kiewiet and McCubbins 1991).

Those studying agency behavior have also come to incorporate the principles of rational choice theory. Much of this work has characterized bureaucratic behavior as an effort to maximize the preferences of a variety of principle actors within the executive branch (Calvert, McCubbins, and Weingast 1989; Eskridge and Ferejohn 1992; Moe 1987a, 1987b; Spence 1997; Wood and Anderson 1993; Wood and Waterman 1991). But, some analogous scholarship has also documented how non-executive branch actors, such as Congress, specifically the agency oversight committees (McCubbins, Noll and Weingast 1987, 1989; Weingast and Moran 1983), in addition to independent interests of the agency actors themselves (Carpenter 2001; Dodd and Schott 1979; Macey 1992; Niskanen 1971), or a combination of multiple principle influences (Huber 2007), have all sought to maximize their own preferred positions within the bureaucracy as well.

Simultaneously, but largely independent of the congressional literature, judicial behavioralists also relied on rational choice theory to develop distinct models explaining how Supreme Court Justices decide cases. With the corresponding development of comprehensive databases on judicial decisions and reasonable means for operationalizing judicial ideology, scholars developed the attitudinal model of judicial behavior (Segal and Spaeth 1993, 2002; Segal 1997) and later the strategic model (Epstein and Knight 1998; Epstein and Walker 1995). The bulk of the judicial studies literature came to focus on determining the effects of this preference based behavior on legal decisions and other government actors, covering a range of topics from the Court's federalism decisions (Gates 1987), to its civil rights



cases (Eskridge 1991a), judicial review cases of agency action (Cross and Tiller 1998; Humphries and Songer 1999; Revesz 2001; Sheehan 1992), and litigant characteristics affecting case outcomes (Sheehan, Mishler and Songer 1992).

### Positive Political Theory

As the scholarship on the behavior of actors within each of the main institutions of American government matured, it naturally progressed into studying how the various actors within each of these branches interact with one another. From this newly emerging line of work, a group of scholars, later referred to as positive political theorists, began to examine how the various actors within each of the branches were influenced by the interactions they must engage in with the other branches of government as each body seeks to influence the development of public policy. Various examples of this scholarship include Calvert, Moran, and Weingast's study of executive, legislative, and agency interactions (1989); McCubbins, Noll, and Weingast's analysis of congressional control of the bureaucracy (1987); Eskridge's investigation of battles between Congress and the Court over statutory interpretation; and Krehbiel's theory of gridlock (1996, 1998).

Positive political theorists, working from the assumption that members of each coordinate branch are acting strategically to see their policy preferences enacted, argued that actors within each institution would need to take into consideration, and respect, the powers of the other branches (Cooter 2000; Epstein and Knight 1998; Eskridge 1991). This scholarly recognition resulted, in part, from different empirical studies showing Congress could override the Court if it so desired (Eskridge 1991, 1993; Gely and Spiller 1992; Meernik and Ignagni 1997; Henschen and Sidlow 1988). Game theoretic models were widely deployed to explain the strategic and iterative nature of these interactions in an attempt to explain how the actors in these institutions behaved (Segal 1997; Gely and Spiller 1990; Eskridge 1991; Epstein et. al. 2004).

Several more recent seminal books helped to cement this idea. Charles Cameron (2000) demonstrated that through the President's use or threatened use of the veto power, Congress and the President may bargain with one another over policy. Cameron exposed the now widely accepted idea that the President can use his veto power not only to block legislation, but also "to shape it" (2000, 9). This conclusion gave new force to what political scientists have referred to as the "second face of power"—meaning the power of anticipated responses (direct compulsion being the first face of power) (Cameron 2000, 18). Thus, even if the direct means of compulsion—in Cameron's case the presidential veto—is rarely used, its known effects can be understood to have a much broader impact on behavior when it is recognized that other actors adjust their actions to prevent even rare events like the veto. In the end, however, following a process of haggling and a series of back-and-forth exchanges, Congress and the President usually "find their way to an agreement that reflects the preference of both parties" (Cameron 2000, 176).

Cameron's own work in *Veto Bargaining* (2000) provided additional empirical support showing the second face of power in operation as also predicted by Krehbiel's theory of gridlock, as advanced in his earlier book, *Pivotal Politics* (1998). Krehbiel starts from the proposition that there is a dearth of theories concerning lawmaking in the U.S. that incorporate the behavior of both members of Congress and the President in the decision-making process. One of his novel contributions was to develop a model about lawmaking that incorporates the deep structural aspects of the separation-of-powers framework to better explain how this influences legislative and executive strategies in the lawmaking process. In particular, he centers on the President's veto authority and the Senate's cloture rule to demonstrate how certain pivotal voters—who are legislators with key preference points where the structural obstacles mentioned above can be overcome—are key to unlocking the natural state of gridlock in the lawmaking process. Lawmaking, he argues, is likely to be unsatisfactory for most of the parties involved, at least in terms of securing a policy most closely aligned with their own preferred

positions. This is due to the reality of these institutional procedures, such as the presidential veto, that necessitate policies to pivot around certain actors who sit at supermajoritarian points on the voting spectrum in order to overcome gridlock.

Interbranch Bargaining: Governance in America

Over the past three decades, the consensus view among scholars with respect to the separation-of-powers system has undergone a radical shift. Whereas much of the work in the 20<sup>th</sup> century began from the premise that the fragmented nature of the federal government would naturally lead to gridlock and incoherent policy, the more contemporary approach has been to set aside the earlier normative assumptions concerning the division of governmental powers. In its place, this more recent scholarship has progressed by first seeking to understand how the actors within the various branches of government operate, then turning to how the aggregate behavior of those individuals influences the direction of the system as a whole, and finally exploring how each of these branches of government navigate the constraints of the system and interact with one another to produce public policy. Each of these more recent books and articles investigate this phenomenon from a unique vantage point, whether it be Cameron's focus on the President and what he labels as veto bargaining (2000), Eskridge's seminal article on the back-and-forth between Congress and the federal courts over interpreting statutes (1991), or the analysis of how Congress exerts control over the bureaucracy done by McCubbins, Noll, and Weingast (1987).

While the direct subject matter of each of these works is distinct, they are all unified by a common theme of "interbranch bargaining" (Cameron 2000). What the more recent scholarship has come to recognize is that despite the division of powers across the three branches of government, public policy can be produced at regular intervals and the policy itself can be cohesive and coherent. But to achieve this, each of the branches must work within the tension created by the American system

and bargain with the other branches, which means making concessions and modifications, in order to achieve a desirable policy outcome. The dynamic nature of this process is best summarized by Charles Cameron (2000, 3), who observes:

The separation-of-powers system was explicitly predicated on the notion of internal balance and dynamic tension among the three branches. What passes for governance in the American system is often the product of pulling and hauling, haggling and bargaining among the three branches. Though this cliché can be found in any textbook on American government, it is only with the recent work on divided government that political scientists have placed interbranch bargaining at the center of theories of American politics.

This passage demonstrates remarkably well how the academy's view on the separation-of-powers system has come full circle and the role that rational choice theory has played in that evolution. With a theory for how individuals, a collection of individuals, and in turn institutions behave it then becomes possible to model how these institutions function and overcome what, on the surface, appears to be a formula for gridlock and incoherent policy, in an effort to govern the nation.

What results from this general body of work is that those scholars studying interbranch relations have come to develop what I label as the *competitive/institutional model* with its central assumption that governance in America is the product of this constant back-and-forth haggling between the branches as they compete with one another to achieve their preferred policy position. This model requires actors in each branch (principally the legislative and executive branches) to act strategically, work within various institutional constraints, and bargain with one another to mitigate the inevitable conflict and, ultimately, produce laws. Thus, there is an inherent tension between the branches as the different actors within each branch act upon divergent preferences and goals. Nonetheless, their interactions are dynamic as these same actors find ways to work with one another and overcome various institutional constraints to develop policy on a regular basis.

The competitive/institutional model is not a theory unto itself; rather it sets out a series of foundational assumptions from which different theories and empirical models can be developed, several

of which have been described above. It is important to understand what these foundational assumptions are, however, in order to better understand the theories and models developed therefrom. In the next few sections, I explore these core assumptions followed by some specific historical examples of interbranch relations. I then raise the possibility of interbranch cooperation between the courts and Congress in the development of public policy to reveal some of the difficulties for each of the assumptions within this framework of tension upon which the competitive/institutional model is built.

### Assumptions Underlying the Competitive/Institutional Model

The preceding comments outline how the conventional framework of interbranch relations envisions actors within these branches strategically competing with one another, in their forced interactions, to achieve their preferred policies. This framework is built on several core assumptions about the separation-of-powers system and the behavior of actors within that system, each of which are explored below.

Conflict Assumption: The separation-of-powers framework deliberately provides each branch of government with a unique charge and independent power base. As the branches interact with one another in the policy arena they naturally come into conflict as they seek to achieve their own policy preferences and appease their unique power bases.<sup>2</sup>

The very nature of the conflict assumption has led most scholars, to date, studying interbranch relations to focus on these cases where conflict is naturally present. For instance, Cameron's (2000) focus on presidential vetoes, and Krehbiel's (1998) focus on both vetoes and Senate filibusters, and Eskridge's (1991) exclusive focus on attempts by Congress to override Supreme Court decisions. Many of the conclusions reached from these scholarly pieces may indeed be sound, but it is important to understand the context of the cases selected and the assumptions justifying those case selections. Those initial selections have an important bearing on the conclusions ultimately reached by each of these authors, which must be recognized.

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<sup>2</sup> This assumption is adapted from a similar framework developed by George Lovell (2003, 24)

Part of the basis for the conflict assumption itself is a long-standing emphasis by political scientists on political power and how that concept has been defined. Some of the origins of the conflict assumption itself can be traced back to Robert Dahl's widely-cited definition of political power, which he understood to mean: "A has power over B to the extent that he can get B to do something B would not otherwise do" (1961, 12). If the very definition of power is exerting influence over another party to force or encourage them to take a position they would not otherwise take, it is no surprise that for scholars studying political power in one form or another would center on those cases where it appears parties are being forced into non-preferred positions. Those same cases naturally involve numerous instances of conflict between the actors trying to enhance their own power base, and thus the origins of the conflict assumption can be better understood.

The conflict assumption centers on the underlying dynamics between the branches, but it speaks less to the issue of how the branches actually interact with one another. This concept is better captured by a second, albeit closely related, assumption:

Competition Assumption: In developing policy, any interaction between the branches is centered in competition and contestation as each of the branches use their designated institutional powers to achieve their own goals while seeking to limit the influence of any competing branch.<sup>3</sup>

The idea that each of the branches are in a competitive struggle with one another exists within the background of much of the literature on interbranch relations. The separation-of-powers system gives each branch a unique constituency or mandate to satisfy while, at the same time, forcing the branches to interact with one another. This reality leads to a naturally competitive state where two or more branches with divergent goals battle it out in an effort to reach a final policy product that is as close to their preferred position as possible.

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<sup>3</sup> This assumption is adapted from a similar framework developed by George Lovell (2003, 26).

The conflict and competition assumptions, by themselves, result in a framework of policy paralysis where the act of governance would be exceedingly difficult. For many decades, as discussed above, these two assumptions dominated the thinking on interbranch relations, which, in part, contributed to the widespread condemnation of the separation-of-powers system among most scholars studying interbranch relations. As discussed earlier, while these scholars noted the significance of the separation-of-powers system in keeping tyranny in check, as a system of governance it was viewed as highly inefficient and unstable.

For the past several decades, however, many thoughtful studies have debunked the myth that a division of power among the branches results in a state of gridlock, undermining the ability of the federal government to do its job. In fact, many of these studies have not only shown that gridlock is no higher during periods of divided versus unified government; instead, policy productivity remains relatively constant across these different periods. In coming to this empirical realization, a third assumption has emerged to explain how in a world of conflict and competition public policies are still produced at regular intervals. This third assumption, thus, is as follows:

**Bargaining Assumption:** The policy produced through these actions and efforts to govern the nation are developed in a conflict-centered environment and the product of the competing preferences of these different branches. The competing interests are mediated through the act of bargaining, and this mechanism is effective in producing policies at regular intervals even during periods of deep partisan divisions.<sup>4</sup>

What this final assumption has clarified is the identification of the mediating force—bargaining—that political actors use to overcome the reality of conflict and competition in interbranch relations, a state of affairs demanded by the separation-of-powers system.

The significance of the bargaining assumption is two-fold. It allowed scholars to square two seemingly conflicting elements of the American system. First, the separation-of-powers system does set

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<sup>4</sup> This assumption is adopted from similar work developed by Charles Cameron (2000, 3).

the branches in tension with one another where conflict and disagreement are likely to rise.

Simultaneously, more recent evidentiary discoveries have revealed that, in fact, public policies that stem from these interactions are produced at regular intervals regardless of level of tension produced during periods of divided versus unified government. In other words, conflict and policy productivity can coexist when the force of interbranch bargaining is inserted into the equation. Thus, a theory of divided government where the separation-of-powers system was no longer scorned was born. On a related, but distinct, point, this assumption helped to fuel a number of theories about governance in America where power is in fact separated among the three branches arguably making the governance process here unique and more challenging. Many scholars, operating from these assumptions, came to situate the act of bargaining across the branches at the center of a broader theory of American governance. Governance in America, they argued, is not a fluid or linear process whereby one body or one party can set a nation on a particular course with few obstacles. In America, because of the separation-of-powers system, what passes for governance is a constant back-and-forth as actors across each of the branches continuously haggle and clash with one another in the development of policy and laws to guide the nation.

### A Theory of Governance?

The case examples relied upon by much of this scholarship justifies the bases for these three assumptions. When the analysis in cases of presidential vetoes or congressional overrides is centered on attempts wherein actors in one branch are overtly trying to exercise their own power and win conflicts they may have with other branches, these three assumptions about behavior work quite well. The critical problem, however, in crafting a broader framework concerning governance and policy development from a subset of cases that naturally highlight instances of conflict is that there is no way to know whether such an assumption holds in other situations that may not be inherently contestable.



Empirically speaking, scholars in this area have been, in effect, selecting on the dependent variable by only selecting cases in which conflict necessarily exists. While such an approach offers incredible insight into the behavior of political actors, at best any insight is limited to the context in which those cases lie. As a result, this body of work potentially obscures other types of interactions and different mechanisms by which the actors across the three branches interact with one another.

Power is not exclusively gained by entering into more and more conflicts and winning those struggles. Power has many faces and can be enhanced just as well by deliberately avoiding conflict rather than inviting it. Also, it is not a stretch to believe that the relationship between the parties is not always driven by conflict and can sometimes be guided by a desire to cooperate. The federal government is a massive network of individuals and agencies that literally involves thousands, if not millions, of interactions on one level or another on a daily basis. It is hard to imagine on just a practical basis that all, or even a majority, of these regular and routine interactions are grounded in an ongoing state of conflict. If, for no other reason, the amount of energy needed to maintain such a heightened state of tension would be beyond what any one person or organization is capable of producing. On at least a level of abstraction, it seems entirely possible that perhaps some of these interactions are more cooperative and coordinated than much of the scholarship on interbranch relations to date would lead one to believe.

Combining these two points, it becomes possible to question whether the models developed by these various positive political theorists studying interbranch relations result in a comprehensive theory of governance or something more modest. Charles Cameron, as a representative figure for much of this scholarship, has concluded in his own work that what passes for governance in America is a constant state of tug-of-war between the branches with the force of interbranch bargaining sitting at the center of these relations as the key mediating mechanism in American politics. But, are these ideas and

assumptions truly a universal model of governance? In other words, it seems unlikely that a state so constantly fractured with its main political actors constantly in competition with one another could ever perform its one and central task—governing the nation. While the work of positive political theorists studying interbranch relations certainly puts forward a model for understanding how legislative productivity remains high even during periods of divided government, it goes too far to classify this as a comprehensive and universal theory of governance. It remains to be well understood how the separation-of-powers system can operate in a way that has enough stability for the state to perform its central function of governing. State actors must coordinate at least some of their actions so that governance can take place, and what is still needed is a theory for why and how such coordination takes place. Before examining such a theory, however, it is important first to offer some support for the notion of interbranch cooperation.<sup>5</sup> The following historical examples help support this point.

#### A History of Cooperation

Beyond this more pragmatic argument, the history of the American State is filled with examples of the different branches deliberately avoiding confrontation, endorsing questionable tactics of the other branches, and in some cases working cooperatively with one another to achieve a common objective. Many of these examples come from periods of crisis, at varying levels, and are often driven by a more pragmatic view of the separation-of-powers system among the key actors in the various branches that influence judicial decisions and political considerations. But, what they help to collectively demonstrate is that not all decisions and behaviors by the different branches of government

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<sup>5</sup> The argument here is built on the belief that the act of bargaining is a non-cooperative form of interaction. It is plausible to argue precisely the opposite, that bargaining requires a spirit of cooperation for it to function. As a general matter that is likely true, as the parties engaged in bargaining over a topic must agree, at least implicitly, on a set of grounds rules governing their negotiations, and they share a common objective of reaching a mutually agreeable resolution. Nonetheless, the concept of bargaining, as used by rational choice institutionalists, does not share those same general assumptions. Bargaining, as understood by scholars like Charles Cameron, is more of a means to an end, with the underlying relationship still grounded in a state of conflict. The idea of interbranch cooperation outlined above consists in large part of the idea that there is a shared and common objective that all sides seek to realize in spite of their unique positions or preferred policy preferences. The presence of a shared objective is antithetical to the tenets of rational choice theory.

can be explained solely on the assumption that all interactions between actors across the three branches of government are defined by conflict and competition, as each of these actors seek to give effect to their *a priori* policy preferences. These are two of the critical assumptions underlying rational choice theory (what I label as the dynamic tension framework) but as these examples show, such an assumption is not always supported by real-life examples. Individuals, at least operating in their official capacities, can be driven by a different set of motivations that does not presume they are all policy-driven actors seeking out conflict to effectuate their personal preferences and enhance their own power.

*Judicial Empowerments of Congress*<sup>6</sup>

Since the time of *Marbury v. Madison* (1803), when Chief Justice Marshall proclaimed that it is the judiciary that has the final power to “say what the law is,” the Supreme Court has been in a remarkable position to actively check Congress’s ability to legislate. Yet, in countless examples, the Court has acceded to, sooner or later, the direction Congress was determined to move toward. For example, from roughly the turn of the 20<sup>th</sup> century until 1937, the Supreme Court found itself in what would later be labeled as the *Lochner* Era. While initially targeted at the States’ police power and its impact on an individual’s economic liberty, the general doctrine would grow over the subsequent decades to reign in ever expanding attempts by Congress to regulate the nation’s economic life through the Commerce Clause in Article I.<sup>7</sup> During the Great Depression, however, the liberty of contract doctrine that had dominated the Court’s thinking for the past several decades resulted in the Court striking down much of the legislative effort by Congress and the President to pull the country out of an economic depression through the *New Deal*. The frustration between the branches culminated in 1937 after President Roosevelt threatened to try and expand the number of seats on the Court, often referred

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<sup>6</sup> Many of the following examples are adapted from *The Judicial Branch*, eds. Hall, Kermit L, and Kevin T. McGuire (2005) in an article written by Richard A. Brisbin, Jr..

<sup>7</sup> See *Adkins v. Children’s Hospital*, 261 U.S. 525 (1923).

to as his “court-packing plan.” While the plan never came to fruition, about two months later Justice Roberts, who had previously sided with four other justices in support of the liberty of contract doctrine, abruptly changed directions and voted to uphold a wage law for women and minors in Washington State in the case of *West Coast Hotel Co. v. Parrish*<sup>8</sup>. Since this case, the Court largely endorsed, for many decades<sup>9</sup>, Congress’s broad interpretation of the Commerce Clause<sup>10</sup>, which helped fuel the expansion of the national government and overwhelm the principle of federalism that had theretofore been dominant in America.

The Latin maxim *delegate postestas non potest delegari* (“delegated power cannot be delegated”) embodies one of the key principles in most separation-of-powers system that the legislature is not supposed to delegate, particularly to the Executive, its power to make laws. Enforcing such a principle would appear even more important in the American system that maintains a strong anti-bureaucratic sentiment. Yet, the Supreme Court has been remarkably complicit in permitting the congressional delegation of its legislative powers to executive agencies. With a few notable exceptions over the years<sup>11</sup>, the Court has largely absolved Congress from specifying what specific powers are being delegated to the various agencies, opting instead to allow for broad and vague delegations. The wholesale expansion of the American administrative state, beginning around the turn of the 20<sup>th</sup> century, which has largely been brought about through the congressional delegation of power, has been almost universally endorsed by the Court despite a sound Constitutional basis for the Court to reign in

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<sup>8</sup> 300 U.S. 379 (1937).

<sup>9</sup> See *U.S. v. Darby*, 312 U.S. 100 (1941); *Perez v. U.S.*, 402 U.S. 146 (1971); *Hodel v. Virginia Surface Mining & Recl. Assn.*, 452 U.S. 264 (1981).

<sup>10</sup> Most Court commentators agree that the broad decades-long discretion afforded Congress by the Supreme Court on the Commerce Clause came to an abrupt halt in 1995 when the Court issued its decision in *U.S. v. Lopez*, 514 U.S. 549 (1995), ushering in what has been referred to as the “federalism revolution.” Subsequent cases from the Court further restricted Congress’s Commerce Clause power, including *U.S. v. Morrison*, 529 U.S. 598 (2000) where the Court struck down provisions of the Violence Against Women Act of 1994. However, the Court only took its newfound stance so far, upholding Congress’s exercise of its Commerce power in several cases, including *Reno v. Condon*, 528 U.S. 141 (2000) and *Gonzales v. Raich*, 545 U.S. 1 (2005).

<sup>11</sup> See *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

such a practice. Thus, in spite of its clear legal authority to resist such efforts, the Court has consistently relented to a clear decades-long effort by Congress to delegate and grow the bureaucracy.

*Judicial Empowerment of the Presidency*

While the President's enumerated powers are less voluminous than that of Congress, the importance of this office has grown exponentially over the years and, without a doubt, the Supreme Court has played a role in this expansion. For example, the Court recognized in *United States v. Nixon*<sup>12</sup> an inherent executive privilege to protect confidential communications between the President and his cabinet officers and aides, despite no mention of such a privilege in the Constitution. The Court has also found that incident to the power to appoint officials, which require the advice and consent of the Senate, is the unilateral ability to remove certain officials.<sup>13</sup> Both of these expansions of the Presidency that have been endorsed by the Court permit more energy in that office and allow the President greater control over asserting his/her policy perspectives.

This endorsement of a more vigorous presidency is perhaps no more apparent than in the area of foreign policy-making. The formal powers of the office in the foreign policy realm are generally thought to come from the ability to appoint and receive ambassadors and the President's power to make treaties (subject to Senate approval). Largely from those two formal powers, the Supreme Court has allowed for an expanded interpretation of these powers to enhance the President's general foreign policy power. Thus, the Court has permitted the President to enter into "executive agreements" with other nations, which commits America to a course of action, but does not require, or allow for, Senate approval. A number of Presidents have also terminated treaties on their own, but the Supreme Court

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<sup>12</sup> 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974).

<sup>13</sup> See *Myers v. United States*, 272 U.S. 52, 47 S.Ct. 21, 71 L.Ed. 160 (1926).

has to date refused to consider any challenge to such an action. The Court has also deferred to presidential decisions to ban travel to certain countries and capture foreigners on the open seas.

*Coordination during Wartime Emergencies*

As the Commander-in-Chief, the President has the singular most important constitutional position in our government as he is charged with overseeing all military operations in defense of the country. This is not to say, however, that the other branches do not have a role to play as well during wartime emergencies. Congress has the sole ability to declare war and is responsible for allocating funds from the treasury for military operations. The Supreme Court can grant petitions to review detention decisions made by the Executive and can review actions taken by the President that may impede individual constitutional rights, such as the freedom of press. More often than not, however, both Congress and the Supreme Court have yielded to the actions of the President during wartime emergencies, allowing for an ever increasing expansion of the powers of this office and, importantly, simplifying the process of governance at least during these periods of emergency.

In the *Prize Cases* (1863), the Supreme Court upheld President Lincoln's declaration of a naval blockade and order for the seizure of the property of Southerners captured in the blockade even though Congress had yet to declare war and such actions would in ordinary times be considered unconstitutional. In 1917, Congress passed the Espionage Act, giving the Executive branch authority to arrest critics of World War I, which the Supreme Court validated in a series of cases. Congress also gave the Executive authority during this time to take control of rail and water transportation and telecommunications, and to prohibit the sale of alcohol. During World War II, Congress gave President Roosevelt the authority to control prices and ration goods and services. In the now-infamous case of *Korematsu v. United States* (1944), the Supreme Court validated the President's decision to detain tens of thousands of Americans of Japanese ancestry despite what would later be recognized as a clear

violation of numerous Constitutional rights of those American citizens. Notwithstanding the dozens of military conflicts that the United States has been engaged in over the years, Congress has only declared war on five occasions; yet, it regularly appropriates funds to conduct these military operations even in the absence of a formal declaration of war.

### *Presidential and Congressional Relations*

Over the years, Congress has delegated much of its legislative authority over to the Executive branch. For instance, Congress now requires that an office within the White House, the Office of Management and Budget, maintain primary authority for drafting the annual federal budget that Congress then uses as a guide for its own appropriation process as it authorizes the expenditure of funds from the Treasury. Primarily in the 20<sup>th</sup> century, the use of executive orders on a range of domestic and foreign affairs has increased dramatically, and very little has been done to challenge this from either Congress or the Supreme Court. These orders have formed the basis for a more widely accepted “Unitarian Executive” theory whereby the Executive can unilaterally direct agency rules as they implement policy. This includes the ever expanding use of presidential signing statements whereby the President interprets how he believes a law should be implemented by the agency even if that interpretation arguably conflicts with the text of the law, as drafted by Congress (Cooper 2005).<sup>14</sup>

### *Presidential Support for the Court*

The Supreme Court has always been in a particularly precarious position when it comes to enforcing its decisions because as astutely noted by Alexander Hamilton, writing as *Publius* in *The Federalist Papers*, the Court does not have “influence over either the sword or the purse” ([1788] 1961,

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<sup>14</sup> The modern iteration of signing statements can have varying features, but for the most part they contain one of the following features, or some combination thereof: (1) a detailed statement of how the president understands the law to operate; (2) any statements concerning the president’s belief that certain parts of the new law do, or may, violate the constitution, particularly if construed in a certain manner; or (3) contain explicit instructions to those executive agencies tasked with enforcing, and possibly developing regulations, the new law on how the law should be applied.

465). The Court learned this lesson early in its history following issuance of its famous decision *Worcester v. Georgia*. The case involved a New England missionary, Samuel A. Worcester, who had refused to comply with a Georgia law requiring any white person residing within the Cherokee Nation to take an oath promising to follow Georgia law. Mr. Worcester's refusal landed him in a Georgia prison, which was what precipitated the case in front of the Court. The Court ordered Mr. Worcester to be released in an order issued on March 5, 1832, but the State of Georgia refused to honor his release. President Jackson refused to intervene on the Court's behalf, allegedly uttering the now-infamous phrase "Well, John Marshal has made his decision, now let him enforce it." Shortly thereafter, however, after South Carolina passed its "Nullification Ordinance," President Jackson understood the implications of his earlier refusal to enforce the Court's order. Upon a new application to the Court to review the matter, Jackson indicated the federal government would enforce the Court's decision, which eventually lead to Worcester's release.

In perhaps the most famous case of the 20<sup>th</sup> Century, *Brown v. Board of Education of Topeka, Kansas* and its progeny, *Brown II*, the President took an active role in supporting the Court's decisions despite their racially charged and controversial outcomes. When the Little Rock Arkansas School Board refused to implement an integration plan consistent with the Court's ruling, a serious standoff between Governor Faubus of Arkansas and the Court ensued. Some level of intervention by the executive branch became necessary. After much deliberation, President Eisenhower took an active role in enforcing the Court's order by involving both the FBI and the Justice Department, meeting directly with the Governor, and eventually deciding to send federal troops to Little Rock to force the integration of the schools. Eisenhower issued an order commanding "all persons engaged in such obstruction of justice to cease and desist therefrom, and to disperse forthwith" (Nichols 2007, 192). Unlike President Jackson's initial instinct some 120 years earlier, Eisenhower decided that a unified federal position and a respect for the



rule of law outweighed any countervailing concerns he may have had with the Court's underlying decisions.

Collectively, these historical examples help solidify the broader point that the branches of government, despite being set in opposition to one another, regularly and consistently operate in a manner that not only explicitly avoids conflict but is instead based on a more cooperative framework where in some cases the branches actually coordinate behavior to achieve a common goal that they at least subjectively believe to be in the greater interests of the country as a whole. While these anecdotes are not, in and of themselves, definitive evidence of a broader cooperative system of governance, they do call into question the conclusion reached by many rational choice institutionalists that governance in America is primarily centered on a system of conflict and contestation as a result of the separation-of-powers framework. If that was true, the examples just discussed should not exist.

Much of the work produced by these rational choice institutionalists, particularly those putting forward a broader theory of governance or lawmaking in America, also centered largely on the interactions of the legislative and executive branch in developing the nation's laws. This primary focus on these two branches is without question, as the Constitution gives the actors within these two branches unique responsibilities in developing laws and both branches are more directly accountable to the people through the electoral process. But, by largely omitting from this theory the role of the courts, one of the three branches in the federal government, in the governing and policy development process, can any previous claim of articulating and identifying a "universal" theory of governance and lawmaking truly be considered "universal?" The historical examples just provided show that the courts, particularly the Supreme Court, have played an instrumental role in both defining the scope of the powers advanced by the legislative and executive branches and in influencing the direction of public policies themselves. As noted at the outset of this chapter, however, the courts' role in our democratic

system has always been understood as perilous because its institutional design seems to contravene the majoritarian and democratic principles of this country. Before turning to the final part of this chapter that seeks to articulate a new and broader framework of governance, it is useful to further elucidate the role of the federal courts and amplify the significance and legitimacy of their role in governing and developing the nation's laws.

### Judicial Policy Making

Most conventional scholars studying American democracy celebrate a belief that the original design of the American system was one that embraced the notion of majority rule. As noted by scholars like John Hart Ely, "majoritarian democracy is...the core of our entire system" (1980, 7). Majority rule has also been labeled the "keystone of a democratic political system in both theory and practice" (Choper 1980, 4). Simultaneously, the principle of majoritarianism is expressed through the electoral process and enforced through the norm of legislative supremacy (Peretti 1999). Under what has been referred to as a "neutralist theory of American democracy," the decisions of the legislative body in America are "presumptively superior, perhaps inviolable" (Peretti 1999, 190-91). As a consequence when the courts, particularly the Supreme Court made up of unelected and life-tenured judges, decide cases that in any way can be understood to thwart the will of the legislature, particularly when they strike down laws as unconstitutional, the Court is acting as a counter-majoritarian body and undermining this key feature of the American system.

For those studying judicial power and policy making, many have come to rely on this same central assumption of majoritarianism in the American democratic system. The reliance on this central premise has resulted in the development of a general framework for evaluating judicial power and its role in the development of policy, which has been labeled by at least one scholar as the "legislative baseline framework" (Lovell 2003, 4). The belief underlying this framework is that the policy decisions

made by elected legislators form a democratic baseline against which the later decisions by unelected judges can be evaluated. For those subscribing to this neutralist perspective of American democracy, whenever the courts issue decisions and exercise their power of judicial review, they must not stray too far from this theoretical democratic baseline for fear of violating the paramount authority of majoritarianism within the American system. The Court's legitimacy, in turn, is directly correlated with its ability to maintain proximity, overall, to the policy baseline set by legislators who are directly accountable to the people.

There are two critical problems, however, with both the neutralist perspective of American democracy and the closely correlated legislative baseline framework. For one, there is ample reason to conclude that the "American political system specifically and deliberately rejects majority rule as a normatively desirable end" (Peretti 1999, 210). As noted earlier in this chapter, the fear of tyranny was one the central concerns among the founders when constructing the new Constitution. This fear resided not only in a concern over lodging the power of government in just one body but also consisted of a fear of absolute majority control. Madison's famous *Federalist No. 10* centers on the existence of "factions" and the possibility that majoritarian groups could seek to control all levers of government and exert their unbridled will over minority interests or constituencies. This would be an inherently destabilizing system as minority interests are denied their liberty, which in turn causes them to question the legitimacy of the entire state and, perhaps, work to subvert it.

### Pluralism & The Democracy Model

A countervailing viewpoint to majoritarianism puts forward the proposition that the means by which a diversity of interests could be heard and represented came through the Constitutional expansion of different representative institutions, each of which were arranged in a nonhierarchical manner in order to provide multiple access points for the range of interests existing within American

society. In diversifying the range of political institutions and organizing each of them differently, the system inherently allowed for different constituencies to influence the direction of government at varying levels. For instance, a group of atheists may have little influence in a populous chamber like the House of Representatives, but they can more readily access the federal courts by asserting a constitutional claim and perhaps influence policy in that forum. Not only do groups of varying size and clout have multiple institutional access points, but the American system is designed such that no single body of government is deemed superior, as all points of access are seen as having value in helping to build a stronger political consensus.

This theoretical frame, which has been widely discussed for many decades now, is known as *pluralism*, and the diversity and lack of hierarchy generated by a pluralist system, some have argued, are the best tools to achieving a system of legitimate decision-making. As one of the greatest advocates of pluralism, Robert Dahl once noted that “[u]nanimity, though unattainable, is best; institutions must therefore be so contrived that they will compel a constant search for the highest attainable degree of consent” (Dahl 1967, 329). The idea formulated here by Dahl is that no single decision by any single body should ever be understood as final or superior to an alternate state of affairs. Other groups and interests should have the ability to challenge that decision not only within the originating institution but in other governmental bodies as well, in an effort to further refine and reform the particular policy such that it is at least acceptable to the widest population as possible. Such an outcome can result in a more stable and legitimate system as a whole. Governance, therefore, is the product of political actors responding to these diverse and outside political voices, resulting in a model of lawmaking that I refer to as the “democracy model.”

The import of pluralism into the study of judicial power has had at least a minimal effect in offering a legitimating reason for the Court’s exercise of judicial review or construing statutes and using

that power to influence the direction of public policy. The pluralist perspective helps to undermine the claim of political neutralists that majoritarianism resides at the center of American politics, which necessarily demands a limited role for the courts. If, as pluralism posits, what is cherished in the American system is a non-hierarchical system made up of independent branches with their own constituencies and ability to influence public policy, then the Court, with at least the hypothetical ability to open its doors to a diverse range of minority (or majority) interests, can play an important legitimating role in the American system. This work, advocating in “defense of a political court” (Peretti, 1999), relies on pluralism to justify a claim advancing judicial power and the ability of the Court to influence public policy in a more open and legitimate fashion.

The strength of Peretti’s work is two-fold. First, it deliberately interjects the courts in the policymaking process in this country. As she notes:

The Court simply serves as another (and slightly different) step in the policy process, nothing less and nothing more. It provides yet another opportunity for policy initiatives of other branches to be challenged and possibly altered or rejected. Accordingly, the chance that government policy will in the end prove more satisfactory to the diverse interests in our nation is increased, as is the stability of the system as a whole. Because the Court makes policy in the context of individual cases, it may also compensate for the over- and underinclusiveness of legislative policymaking. Thus, the Court’s value in American democracy does not lie in the mystical and superior attributes of judges and the judicial process. Rather, the Court possesses instrumental value in terms of enhancing both the stability of the political system as a whole and the quality of the policymaking process, particularly regarding the breadth of interests represented (Peretti 1999, 6).

Second, this work legitimates the role played by the courts in this process by rejecting the idea that the American system ever gave prominence to majoritarianism and legislative supremacy. In its place, pluralist theory elevates the idea that what is truly valued in the American system is “redundancy, diversity, and nonhierarchy in political institutions” (Peretti 1999, 216). Recognizing those values as core values of the American State, the courts can be properly understood as playing both a central and legitimate function in developing public policy and governing the nation.

### Critiquing the Pluralist Account

The central idea in pluralist theory and the democracy model of a diffuse and nonhierarchical political system is critical to justifying a role for the courts in the development of public policy, but it itself creates three obvious problems when it comes to governing and brings us full circle back to the first question of this chapter of how governance takes place in a system of separated powers. First, the pluralist theory adds a layer of complexity to this question by not only acknowledging the separate powers given to each of the branches but also emphasizing the nonhierarchical ordering of the branches. Power, in the American system, is not only separated across three branches, but in addition none of the three branches have a superior position over the other. Second, pluralist theory celebrates what Dahl labeled the “constant search for the highest attainable degree of consent” (Dahl 1967, 329). These ideas, in combination, imply a regular and potentially infinite cycling of policy as laws are generated in the legislature, implemented by the executive, and interpreted by the courts, only to potentially start over and repeat a similar process over and over again as separate constituencies, unhappy with the direction a particular policy is set by one branch, access different constituencies both within and across the branches with the goal of undermining or altering the direction of that same policy. While such a process may enhance the system’s legitimacy, it necessarily complicates, strains, and interferes with the ability of government actors to govern and for citizens to understand what is expected from them and the rules to operate within. If any given policy is never theoretically settled, it makes it exponentially more difficult for those actors responsible for governing to ever settle on a particular policy direction.

A second related fact is that pluralism does not envision any particular role to be played by government officials themselves. It is assumed that the political system is constantly being accessed by outside actors whose objectives and influence are the sole determinants of the decisions taken by any

one branch and the policy that said branch produces as these political actors seek to appease or mollify their different constituencies in an effort to hold on to their own position. This perspective certainly squares with the widely held viewpoint that the goal of reelection is the single greatest motivator behind the behavior of elected officials (See Mayhew 1974). But, this account within pluralism omits any unique and independent role that the state actors themselves may play in influencing the direction of public policy. Central to the cooperative/state-centered model is the idea that state actors do have an incentive, and are in fact successful at, influencing the scope and purpose of laws in an effort to legitimize their own institution and enhance state authority. This concept exists outside the central assumption in the pluralist account that policy change is dominated by forces exogenous to the state itself. The lack of attention to actors within the government is a notable deficiency in pluralist theory that must be accounted for in seeking a broader understanding of how governance takes place on a routine basis.

Finally, the pluralist account, particularly the version that elevates the courts into a more overtly political role, does not absolve the courts of any question over their legitimacy in the American State. While pluralism offers a theoretical foundation justifying the court's more explicit role in developing and influencing policy, it is far from a universally held view nor is it one necessarily reflective of the reality of how judges decide cases. Much of the scholarship defending or explaining the Court's power of judicial review begins from the premise that what is needed is a "method of constitutional decisionmaking that clearly, coherently, and objectively identifies the properly limited set of issues appropriate for judicial (rather than majoritarian) resolution" (Peretti 1999, 13). In operating from such a premise, it is implicitly accepted that the Court's legitimacy in a democratic system is always on shaky ground and while judicial review is important to the American system its boundaries must be narrow and clearly delineated.

Whether that is true or not is largely irrelevant at this point, as this sentiment is now widely held, particularly among judges on the various federal courts. Most judges do not believe that in writing their decisions they can base their opinions overtly or exclusively on more raw political goals or personally held beliefs, as such an approach would widely be understood to undermine the legitimacy of the courts. While most honest observers of the Court readily acknowledge its decisions can, and do, influence public policy, the means to accomplish this by the justices must be more subtle so that the Court remains legitimate and its decisions are respected. Pluralist theory has no way to account for this phenomenon, primarily because it does not envision any problems with a more political court. But, for the reasons just outlined, any more inclusive theory outlining the role of the courts in directing public policy must account for these legitimacy concerns and the need for judges to communicate their preferences and attempt to influence policy in a more subtle manner.

*The Cooperative/State-Centric Model: A New Framework for Governance & Lawmaking*

If interbranch relations are defined by a state of constant conflict and competition as atomistic political actors seek to enact their most preferred position into law, what explains the regular and routine instances of cooperation by these actors to achieve a common policy objective? With the charge of interpreting laws and the power of judicial review, how can any theory of governance omit any role played by the federal courts in the development of public policy? Is there a role to be played by governmental actors themselves in directing policy and bringing to a conclusion the endless policy cycling that pluralist theory envisions? What is needed is a uniform framework for understanding routine governance that incorporates the input that all three branches of the federal government play in the development of public policy and the role of the actors making up those branches of government in the policy-production process. I propose such a unified approach—the Cooperative/State-Centric Model:



## Chapter 1: Ordinary Governance: A Framework for Lawmaking in America

Lawmaking and governance in America is the outcome of a feedback loop of information wherein Congress delegates some of its lawmaking authority to the other branches, with those political actors then themselves sending critical information back to Congress on the scope, impact, and potential problems with a particular law. The motivation in doing this, shared by all political actors across the branches, centers on a desire to enhance the legitimacy of their institution and the authority of the state as a whole that is best realized through a cooperative spirit with a shared goal of refining and improving the nation's statutory law. The resulting information provided by the Judiciary and Executive is then incorporated back into further amendments of the public law system by Congress, helping each body realize the above-stated goal.

This framework is not intended to be a theory unto itself. Rather, it is intended to provide a set of tools and assumptions for contemplating how the branches interact with one another to craft and redevelop statutory law, which is one of the central, if not most important, functions of the American State. The motivation for this type of behavior, as I argue below, comes from a concern over institutional legitimacy and a desire by political actors to enhance state authority, rather than just their own political prospects as is assumed by the competitive/institutional model. This goal is best achieved by producing good public policies that satisfy a core set of conditions central to any liberal democratic state, including policies that are clear, cogent, predictable, stable, equitable, and just. An important way in which this is realized is through the reaction bill process, which is the subject of this dissertation.

Ideally, specific theories of inter-institutional behavior can then be developed and empirically tested once this framework is recognized, which I seek to do in the later chapters of this dissertation.

Five claims are central to my argument.

Claim 1: Governmental actors (both elected and appointed) routinely operate in a cooperative and coordinated fashion across the separate branches of government in an effort to effectively govern the nation.

For any modern and large state to function and carry out its defined duties there must be a great deal of coordination and cooperation among the three branches of government made up of elected and appointed citizens. Logically, if at every point of contact between government officials as

they carry out their governance duties it was assumed that their behavior was driven by a dynamic tension where each of these actors were focused on getting their own policies implemented, little would ever be accomplished. So much energy would be devoted to navigating all this conflict that, with time being a finite quantity, the plentiful and necessary tasks that any government must accomplish would simply not happen. For the day-to-day operations of the government to take place, cooperation and compromise must be the normal *modus operandi* of the government if, for no other reason, so that the thousands of daily tasks that must be performed by various government officials can indeed happen. As aptly summarized by Ripley and Franklin (1980, 14) in commenting on the policymaking process, while much of the “literature dealing with Congress and the bureaucracy usually focuses on the conflictual aspects of the relationship...the bulk of policymaking is based on cooperation.”

The idea that conflict defines interbranch relations, which premise has dominated much of the scholarship in this area for decades, has more recently come under attack. Relaxing the assumption that conflict defines the relationship, this has opened scholars up to a wide array of examples across history where the branches have worked in a more coordinated and cooperative fashion. In his own work on cases where Congress has deliberately delegated its legislative authority to the federal courts, George Lovell captures this idea well, noting:

While conventional theoretical frameworks incline scholars to see interaction between branches as conflicts between independent strategic actors seeking to pursue well-defined policy preferences, I find that the appearance of conflict between independent branches frequently masks more cooperative interaction between interdependent branches. Dropping the assumption of conflict complicates the task of understanding interaction among branches. However, it also makes it possible to uncover important forms of interaction that are invisible to scholars who look at the same processes as though they are strategic games among independent actors pursuing sharply defined policy preferences (2004, xix-xx).

Other more recent scholarship has acknowledged and discussed a similar sentiment in contemplating the nature of interactions between Congress and the Court (*See Pickerill 2004*).

## Chapter 1: Ordinary Governance: A Framework for Lawmaking in America

Objectively, we know that the different branches, in isolation and in conjunction with one another, are both interactive and productive, which presumably stems from a good deal of cooperative behavior. In the post-WWII period, the average Congress produces over 700 new statutes for each two-year period it is in session (Cameron 2000). For each of these new laws to come about, Congress and the President must, ultimately, reach some form of agreement. While it is certainly plausible that for a small subset of these bills the tenets of rational choice theory offers an explanation for their passage, it is improbable to conclude that the majority of these bills involved a process of intense haggling and bargaining as competing interests across the branches sought to push the particular policy closest to their own preferred position. 700 new laws is an average of more than one new law for each day Congress is in session over a two-year period, which is in addition to the hundreds, if not thousands, of additional bills that receive serious congressional consideration but do not become law in a particular session. It is impracticable to fathom that there is enough time in the day for the actors within these two branches to haggle over each of these bills, particularly due to the fact that a relatively small number of significant bills tend to consume a disproportionately high amount of energy among the actors within both branches. Many, if not most, of these new laws have to proceed along a more cooperative path, evidence of which is drawn simply from the sheer number produced in an average Congress.

Likewise, in examining the relationship between executive agencies and the federal courts through judicial review of agency rulemaking, there is a good deal of empirical support confirming Martin Shapiro's observation that "the courts generally let the agencies do what they want," in turn routinely avoiding conflict even though the courts would be entitled to pursue such an approach (1968; 270-71). Over the last several decades, the amount of new rules and regulations produced by agencies is staggering. In the 2007 *Federal Register*, for instance, over 3,500 new rules were published, each of which was preceded by a lengthy notice and comment period as required by the Administrative

Procedures Act.<sup>15</sup> Not surprisingly, the cumulative number of pages in the Code of Federal Regulations has risen from around 10,000 in 1950 to around 140,000 pages in 2000 (Coglianese 2002). Scholars estimate anywhere from 26% to 80% of agency rulemaking is subject to a court challenge, depending on the agency in question and the nature of the rule (Coglianese 2002; Prizker and Dalton 1990; Wilson 1989), providing the courts with an incredible opportunity to reshape a wide range of federal regulations.

Yet, the empirical evidence suggests that courts are highly deferential to agency determinations. A study of court challenges to rules by the Environmental Protection Agency (“EPA”), which are widely believed to be among the most litigated, showed that about 26% of the total rules by the EPA are challenged and about 35% of the significant rules are challenged (Coglianese 2002). Many of these challenges are resolved before any final judgment, but of those formally decided by judges or an appellate panel more than one-half of these cases uphold the rule in its entirety. Of those rules that are remanded to the agency, studies have shown only about 14% of those cases represent serious obstacles to the agency in achieving its original objective (Coglianese 1997; Jordan 2000; Wald 1994). In total, for example, judicial review has been found to block the EPA in only about 0.5% of all its rulemaking (Coglianese 2002). Despite the formal mechanism of judicial review to influence the direction of agencies and thousands of cases annually to deploy this mechanism, the data suggests that courts are highly deferential to agency determinations and objectives.

Anecdotally, it is also clear that the relationship between the branches is not always defined through conflict. History is replete with examples of the branches working in some type of cooperative fashion (or at least deliberately avoiding conflict with another branch). Each branch, at different times, has worked with or endorsed the behavior of another branch even when the Constitution itself might

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<sup>15</sup> U.S. National Archives and Records Administration, Office of the Federal Register, “Chart 10: Federal Register Documents, 1976–2008.”

demand a more vigorous intervention. Any student of American history could readily come up with a number of examples of this phenomenon. For instance, Congress has been willing to follow decisions by various Presidents to engage in a number of military conflicts even though it is the body charged with declaring war, having not made such a declaration since World War II despite several wars taking place during this time. Another example of this is how the federal courts treat regulations that have been adopted by various agencies and subsequently challenged by different parties. Under the so-called “Chevron Doctrine,” if a particular statute has a gap in it and Congress delegated its power to the agency to fill that gap, the courts will defer to the agency’s expertise and authority so long as it is a reasonable interpretation of the underlying law. The mere existence of this doctrine, which dominates administrative law cases, makes little sense under the tenets of positive political theory.

The argument here is not that interbranch relations never involves instances of conflict or attempts by political actors to push through a version of a policy most closely aligned with their own preferences even if those efforts invite competition and contestation. Certainly such interactions take place at routine intervals. But, the assumption that conflict *defines* all or even a majority of interbranch relations is, I believe, inaccurate. To date, much of the scholarship on Congress and its relationship with the other branches has focused on the conflictive aspects of this relationship. But this singular focus, I argue, can be explained in part due to the simple fact that to quote Ripley and Franklin (1980, 14), “conflict is a more exciting topic than cooperation.” This more enticing story line, naturally, leads scholars to focus on examples or elements of the relationship between the branches where conflict is on most prominent display. It is a mistake, however, to extrapolate from such a myopic focus that such examples define the broader relationship between the branches and represent the core aspects of their behavior. In rejecting the assumption of conflict, this opens one up to other examples of interbranch relations, and in exploring this diverse range of interactions it is my contention that the conflict assumption cannot be universally maintained. In its place, as the evidence produced in this dissertation

will demonstrate, in thinking about the full breadth of governance and interbranch relations in America it is more accurate to work from the idea that cooperation and coordination define a significant component of the interbranch relationship.

Claim 2: Modern Congresses delegate a significant portion of their constitutionally prescribed legislative authority to the other branches of government (both the executive and courts) in an effort to invite into the lawmaking process the views and insights of actors within those branches. The motivation for delegating some authority is, in part, politically motivated as a blame-shifting mechanism. But, it is an approach that Congress also views as a value added proposition in terms of enhancing the quality of the laws it develops and, in turn, improving governance, through the insights offered by the other branches.

For those scholars who subscribe to a neutralist theory of American democracy, they celebrate the original design of the American system that embraced the notion of majority rule, as expressed through the electoral process, and enforced this rule through the norm of legislative supremacy (Ely 1980; Choper 1984). In particular, the separation-of-powers framework created a system whereby Congress creates the law, the Executive enforces the law, and the Judiciary interprets the law. By the close of the New Deal Era, however, this system of governance in which power was more clearly separated between the legislative, executive, and judicial departments had given way to a more mixed system. Many scholars attribute this shift to the solidification of a process long underway whereby Congress delegated much of its lawmaking authority to the executive branch and the attached bureaucracy, giving rise to what is now referred to as the modern administrative state (Epstein & O'Halloran 2004, Bense 1980). As a consequence, the law-making process in America was radically changed, and it now placed a heavy reliance on bureaucratic and judicial discretion in both crafting and interpreting the meaning of any given law. This process is what one scholar has fairly characterized as "the most striking characteristic of the modern state" (Bense 1980).

While some have become resigned to the rise of the modern bureaucratic state, a few notable scholars have risen as forceful critics, arguing that a necessary consequence of this process is a

diminishment in the importance of statutory law and a threat to the survival of Western democratic systems (Bensel 1980). One of its more notable critics has been Theodore Lowi, who began his critique in *The End of Liberalism* (1969) from his belief that the rule of law is the means through which the representative branches of government will be compelled to resolve political conflicts. Understanding the rule of law in this manner results in the maximization of both “the decisiveness and legitimacy of state policies” (Bensel 1980, 736). Nonetheless, the contemporary system that has developed,--what Lowi calls the “modern law”-- can be described simply as a “series of instructions to administrators rather than a series of commands to citizens” (Lowi 1969, 144). This delegation of power by Congress results in public policies, Lowi believes, that are wrapped in “shrouds of illegitimacy and ineffectiveness” (1969, 127). As legislators leave more and more laws open-ended, Lowi sees an abdication of responsibility by members of Congress with respect to their necessary role of executing public policy. In its place, Lowi details the rise of “interest group liberalism” wherein organized interest groups are better able to establish close relationships to the very regulators meant to control them. Through this process, those interest groups are better able to achieve more favorable policy for their private interests (Lowi 1969).

While this “democratic baseline framework” has served as a basis for criticizing this shift in governance (Lovell 2003); recently other scholars have challenged the assumptions of this framework by arguing that courts have deliberately been given a role in crafting policy by Congress, and in having courts play this role it enhances the pluralistic process that is the cornerstone of the American system of government (Graber 1993; Lovell 2003; Peretti 1999; Rogers 2001). The significant role played by the courts in crafting public policy has been closely documented by Graber (1993) and Lovell (2003) who, through detailed case studies, have shown that Congress deliberately invites the courts to intervene in crafting policy. They argue that legislators deliberately delegate legislative power to the courts in order to “avoid responsibility for particularly important and contentious policy issues” but also because they

want to empower judges to resolve long-lasting conflicts, which are “particularly suited for resolution through the principled legal reasoning employed by judges” (Lovell 2003, 17, 255; *See also* Graber 1993). The principle advanced by this work is that Congress values certain policy decisions being made by the courts and consciously invites this intervention.

The significance of this claim is a recognition of the role played by the courts in the development of public policy within the modern administrative state. While some may reject this role on normative grounds or argue that it subverts the original constitutional sphere of the courts, the historical trajectory of the courts to the role it now plays in developing policy cannot be denied. Congress’s collective practice, which has only solidified over time, to invite the courts into the lawmaking process cannot be ignored and necessitates consideration of the role played by the courts in that process whenever theorizing about lawmaking and governance in America.

Claim 3: Both through their delegated authority and within the pluralist account of American constitutional democracy, the courts play a vital role in considering the interests of different public constituencies, interpreting laws, and influencing the meaning and direction of public policy. Any account of governance in America necessarily must include the role played by the federal courts.

Among those scholars studying the effects of congressional delegation of its lawmaking authority, a number of them have commented on how this delegation elevates the courts into an important position when it comes to developing and applying the law. One reason behind deciding to delegate some of its legislative authority is so that Congress can delay making a final decision on a particular matter and, in turn, avoid upsetting or frustrating certain constituencies. Congress can accomplish this end by making the policy either patently or latently ambiguous, delegating decision-making authority both to the bureaucracy and the courts to fill in any gaps or offer a definitive interpretation of unclear language. The delegation of authority empowers those bodies to determine the parameters of the new policy and take credit, or typically blame, for those decisions (See Ripley and Franklin 1980; Lovell 2003). Even though members of Congress may have a self-interested motive in



making the delegation, either because a compromise position could not be reached or because they want to avoid blame, the reality is that in making this delegation it allows the courts a unique opportunity to imprint their own perspective on the law with at least tacit authority to make such determinations. Thus, the ever-growing decision to delegate lawmaking authority is important not only in that it implicates democratic accountability, but also because of the elevation of the courts in the lawmaking equation in modern American society.

In delegating, Congress also provides both the executive branch and the judicial branch a unique opportunity to “fine-tune bad laws” (Pickerill 2004, 27). Agency bureaucrats and judges on the federal bench have several distinct advantages over members of Congress that allow for their interpretations of laws to have a certain value-added effect. Most federal agencies have both a rule-making and quasi-judicial role through which the bureaucrats can gain additional “on-the-ground” expertise concerning the development and implementation of a particular statute. Agencies invite extensive public comments when developing regulations, allowing for businesses, interest groups, labor unions, academic or policy experts, and ordinary citizens to comment and provide input on various laws. As the agencies administer these laws they also closely monitor the implementation process that can help address problems that may have been unforeseen when the statute or accompanying regulations was originally adopted. That information can then be transmitted back to Congress through a variety of mechanisms.

The federal courts can likewise serve as an important information conduit concerning policy implementation. Through the confines of a particular case or controversy, judges may come to recognize a conflict between two or more statutes or a statute and the common law that was not previously recognized by Congress when it passed the law. Most laws, regardless of the care taken by their crafters, are strewn with ambiguities throughout the text. Language is an inherently imprecise tool

in communicating intent, but judges (for the most part) have developed a unique set of skills and canons of statutory construction that uniquely aid them in interpreting the meaning of written words, a skill not necessarily shared by political actors in the other branches of government. That unique skill sets allows for judges to interpret unclear words, harmonize inconsistent passages in a law, and give effect to gaps in the law. Courts also have a unique vantage point when considering the text of a particular law. Each case always involves a distinct set of facts to contemplate, and it permits the judge(s) to consider how a particular law is unfolding in the real-world. Given this opportunity to review and interpret laws, some of which may have been sloppily crafted or just failed to recognize a latent ambiguity in the text, courts can “force Congress to revise statutory language in a more careful and deliberative manner” (Pickerill 2004, 27). Presumably, therefore, as at least a partial consequence of the decision to delegate, the courts and agencies are thrust into an important role of helping Congress to create better laws, at least in terms of forcing clarity and consistency in their scope and application.

Although some may question the authority of the courts in the role just described despite this reality of congressional delegation, the pluralist account of American democracy offers a way to legitimize this judicial function. In a pluralist system, the standard for measuring an institution’s legitimacy is not in its majoritarian contours and electoral accountability. Instead, it is the “degree to which it adds to the number and diversity of arenas in which groups can regularly and effectively advance their interests, thereby contributing to the reliability and stability of the political process as a whole in ascertaining the enduring bases of political consent” (Peretti 1999, 216). The fact that courts are given some additional power by Congress to interpret and expound upon the meaning of laws only enhances their status as an alternate arena by which various groups and individuals can seek to shape the direction of any given policy, in turn expanding the system’s overall base of consent.

My argument is that any theory of governance and policymaking that puts Congress, or even Congress and its relationship with the President at its center, ignores the reality that the idea of legislative supremacy in the policy development arena gave way long ago. In its place, in many ways at the behest of Congress itself, the judiciary has come to play an important role in crafting laws and directing policy not only through its natural interpretive role in the cases that come before the courts but also because Congress has specifically invited the judiciary to resolve certain conflicts and ambiguities in the laws and, in turn, take credit, or blame, for those decisions. Although perhaps not originally designed as such, the federal courts have come to play an expansive and important role in crafting public policy, and thus any theory of governance (at least in terms of the mechanism by which public policies are developed in American) must contemplate an important role played by the courts in such a process.

Claim 4: Judges have an interest in producing good public policy that has a positive effect on efforts to govern the nation. The motivation for this comes from a desire to enhance their institutional legitimacy and expand the authority of the state. But, courts must always be cognizant and protective of their institutional legitimacy when interpreting laws and deciding cases. Therefore, judges must use subtle and more formal mechanisms for communicating to the other branches of government and tailoring the scope of their decisions. Judges can accomplish this by inviting Congress, through their written decisions, to alter a policy going forward in order to correct a perceived or actual deficiency.

The idea that judges have an interest in producing good public policy, while not widely held in the academy, has found both empirical and historical support among some judicial scholars. In studying a phenomenon whereby Supreme Court justices invite Congress to override their own decisions, Lawrence Baum and Lori Hausseger studied hundreds of Court decisions across five consecutive terms and found substantial empirical support for the idea that what motivates justices in issuing these invitations within their written decisions themselves is a “concern with achieving both good law and good policy” (1999, 182). Likewise, in his historical accounting of many of the Supreme Court decisions during the so-called “Lochner Era,” Howard Gillman, arguing for a revisionist account of what motivated

the Court in those cases, envisions a desire among the justices to advance the public good, rather than an overly strict laissez-faire economic viewpoint, as the intellectual backbone for these late 19<sup>th</sup> and early 20<sup>th</sup> century cases. Specifically, he argues the justices were guided by a set of principles that “encouraged nineteenth-century judges to uphold legislation that (from their perspective) advanced the well-being of the community as a whole or promoted a true “public purpose,” and to strike down legislation that (from their perspective) was “designed to advance the special or partial interests of particular groups or classes” (Gillman 1993, 10).

This, of course, is not to suggest that there are not other motivational factors that influence any particular justice on any given case in deciding what side to support. Indeed, there is a wide body of scholarship supporting both the attitudinal and strategic theories of judicial decision-making, and I make no effort herein to argue those approaches do not describe how judges decide cases. My only point is that in at least some of the cases decided by the Court, there is an effort by the justices to improve public policy, address inequities and impreciseness in the law, and help to ensure the law’s application is just and fair. Judges, I argue, are not singularly concerned with just calling “balls and strikes,” as Chief Justice Roberts once put it, or advancing their own policy preferences in each case (whether that be through the precepts of the attitudinal or strategic models). Rather, their motives can be understood to be mixed, at least when examining the entire body of cases that they are called to decide. In some of those cases I believe some of the justices are motivated by a genuine desire to produce more sound and just public policies even if that were to conflict with their own preferred position or puts them into a position beyond mere interpretation of the law as written. This desire is not simply altruistic on their part, but has the added and important effect of enhancing their legitimacy and authority when laws are perceived as satisfying the end of good public policy.

When engaging in the endeavor of trying to improve or clarify laws, judges must always be mindful of both the institutional and traditional constraints on their authority when issuing opinions. While I have rejected the tenets of the “democratic baseline” framework and that any “countermajoritarian” force that the Courts may exert is a threat to the American system of governance, the reality is that judges, particularly Supreme Court justices, are deeply constrained in how they decide cases and draft opinions by the forces of majoritarianism and democratic legitimacy. The Supreme Court, and to a lesser extent the lower federal courts, cannot repeatedly issue decisions that either flaunt the will of the majority or are based on the purely political ideals of the justices rather than existing case precedents. In fact, we know that many of the Court’s decisions closely align with the public mood at any given point in time, evidencing the constraint the Court feels in generally adhering to the prevailing public sentiment (Casillas, Enns, and Wohlfarth 2011; Fleming, Bohte, and Wood 1997; Link 1995; Mishler and Sheehan 1996).

The Court’s legitimacy is directly correlated with the output of the decisions it issues. Questions over the Court’s legitimacy have come in two forms. As just noted, political neutralists who believe that majoritarianism lies at the center of the American system question how a body of unelected life-tenured judges can legitimately shape the scope of any law, particularly when it deviates from the position taken by Congress. More recently, the period of the late 20<sup>th</sup> and early 21<sup>st</sup> centuries have come to be judged by many as a period of intense partisan and ideological polarization. As noted by Gibson et.al (2007, 508), this polarization over policy has caused more and more people to question the “very legitimacy of the institutional author of such policy—the U.S. Supreme Court?” The notion here is that as politics has become more polarized in the legislative and executive branches, there is a concern that the Court has become too caught up in this general polarization resulting in more “politically” based decisions rather than “legally” based decisions.

Scholars studying this legitimacy question, however, have noted how the Court has historically, continuing into this period of political polarization, maintained a “reservoir of goodwill” (Gibson 2007, 512; Eaton 1965, 275) and is widely regarded as a “quite legitimate institution” (Gibson 2007, 514). The Court benefits from what has been labeled as a “positivity bias” where “legitimizing judicial symbols” proliferate, which “reinforces the process of distinguishing courts from other political institutions” (Gibson 2007, 516). One of those key legitimizing beliefs is the widespread understanding and expectation that “judges will decide cases based on facts and existing precedents” (Friedman 2000, 972). Although there is considerable debate within the academy as to the empirical reality behind that expectation, particularly among those advancing the attitudinal and strategic models of judicial decision-making, judges actually write decisions with an almost exclusive focus on the case facts and relevant precedents and there is a widespread belief among the public that this is how cases are decided. If a court were to overtly deviate from these principles in a meaningful and sustained way when it comes to deciding cases and writing opinions, such behavior would likely be noticed by the public and, arguably, threaten the Court’s legitimacy.

A judge’s or court’s most direct and powerful way to influence a particular policy or set of policies is through the written decisions they issue. However, given the institutional constraints just described and the ever-present concern over the Court’s legitimacy, if judges want to communicate a concern about a particular public policy that they do not feel can be supported based on the particular facts of the case in front of them or the underlying case precedent, their options are limited. If for example, a judge believes a particular law failed to contemplate a particular factual scenario and the application of the law as written would be unjust, most judges would feel constrained to issue a decision consistent with the law as written even though the result may be absurd or unjust. In other words, the vast majority of judges, particularly Supreme Court justices, would be unwilling in their decisions to state that they are ignoring the law as written (in a case involving statutory interpretation) instead

deciding the case in a way that they personally consider more just, fair, or equitable irrespective of what the law says. Such an act would be more explicitly political in nature, and something judges on any court feel they must avoid to maintain their institutional legitimacy. So, how can courts convey their policy preferences in the decisions they write in an effort to achieve better public policy without sacrificing their legitimacy?

The courts can accomplish this through a mechanism that I label as “signaling.” I define judicial signals to mean text within a written judicial opinion that attempts to convey information to another branch of government about concerns or problems with a particular law or the court’s application thereof, while conveying this information in such a way that it does not impact the court’s main holding in a particular case. As just noted, most judges believe their written opinions need to be grounded in a reasonable interpretation and application of the law in front of them based on the facts of each particular case. As a matter of practice, the written opinions lay out the logic demonstrating how a majority of the court adhered to the principles just mentioned and reached the particular result in the case. But opinions can, and often do, contain much more than this basic, but important, exercise in deductive reasoning. They may include general historical narratives concerning a particular law, discussions of the legislative history of a particular law, or references to analogous laws at the state level or in different countries. These discussions may inform the opinion, but are not central or necessary to the primary legal holding of the case.

Judges, thus, have more leeway in what they say within the written opinion in comparison to the bottom line holding of the case, which is more restricted in the ways mentioned above. This relative freedom, I argue, allows judges to signal concerns, to Congress in particular, that the court may have with its decision and the application of a particular law while still ruling on the case in a way consistent with the actual facts presented and the relevant legal precedent. With any decision, judges also have

the ability to draft concurring or dissenting opinions where the constraints are even fewer because, by definition, those opinions are not the “opinion of the court.” These concurring and dissenting opinions, which are routinely issued whenever there is a split decision at the Supreme Court level, provide an important and unique avenue for the justices to convey information to Congress or the executive branch about a particular law at issue in the case. While the remarks in these opinions are always carefully calibrated, the justices writing these aspects of the case are far less constrained in what they say because their words have no direct legal effect, unlike the majority opinion of the Court.

While theoretically possible, is there any actual evidence that judges engage in this type of signaling behavior? In fact, for some time now scholars studying legislative-judicial relations have at least noted the practice of judicial invitations to Congress and other types of subtle cues from the Supreme Court to Congress about the scope of a particular law (Henschen 1983, 447; Paschal 1991, 150-51; Ignagni and Meernik 1994, 362-63). Some of this work has included a discussion of the reasons why the Court might issue invitations to override its decision to Congress (Murphy 1964, 129-31; Eskridge 1991, 388-89; Spiller and Spitzer 1995; Spiller and Tiller 1996). The most comprehensive and empirically systematic account of judicial invitations came from a study conducted by Hausseger and Baum (1999), which examined each of the Supreme Court’s statutory decisions issued between its 1986 and 1990 terms. Of the 374 Supreme Court cases in their dataset, they discovered 42 cases, evenly distributed across time and among the various justices, with discrete invitations to Congress to take some type of action concerning a particular law following the Court’s decision. In some cases, these invitations were issued in the majority opinion of the Court and either explicitly stated or implied that Congress should override the Court’s decision. This counter-intuitive behavior occurs, they concluded, because the justices feel constrained to “follow the law as they see it while asking Congress to supplant their choice with good policy as they see it” (Hausseger and Baum 1999, 182).



Opinion signaling allows federal judges to participate in the development of public policy and achieve at least one general goal of producing good law without sacrificing the Court's legitimacy. Through these signals, the judges can still convey valuable pieces of information, particularly to Congress, that they have about how a particular law was crafted or its application while at the same time issuing a decision that holds to the central legal precepts of deciding cases based on the facts as presented in the record and within the confines of existing case precedent. Whether Congress listens to those concerns is an open question and one that will be addressed at length in this dissertation. But, this signaling mechanism undoubtedly provides a means for judges to participate in the policy making process in a way beyond just interpreting the laws as presented to them and is, I argue, an important reason for including the judiciary in the broader lawmaking equation.

Claim 5: The elected or appointed actors making up the government themselves provide critical pieces of information about public policies. This information as a whole is critical in helping Congress settle upon a particular policy direction. Congress, in particular, has developed a mechanism for listening to the viewpoints of actors within the other branches of government and giving credit to those viewpoints as it further refines and develops public policies. In taking steps to produce better public laws, Congress itself enhances its own legitimacy and authority.

Over the past several decades, there has been a growing recognition of the informative role that executive branch agencies, and now more recently the courts, can play in the policy development process (Gilligan and Krehbiel 1987, 1990; Rogers 1998; Baron 2000; Diermeier and Feddersen 2000; Pickerill 2004). Much of the information provided both by bureaucrats and judges, as they implement and interpret laws, is filtered back to Congress and used by that body to refine or enhance previously passed legislation. The importance of this informational role has been developed in much of the literature exploring the reasons why Congress delegates its legislative power to executive agencies and even the courts, with many of these scholars concluding that one reason to delegate is that Congress values the expertise brought to bear on a particular issue by highly trained bureaucrats and judges (Ripley and Franklin 1984; Epstein and O'Halloran 1999; Lovell 2003). As the scope of the federal

government's responsibility has grown through the 20<sup>th</sup>, and now 21<sup>st</sup>, centuries, "the sheer volume and technical complexity of the work are more than Congress...can manage alone" elevating the need for additional personnel and policy experts to share in the work-load (Ripley and Franklin 1984, 17).

More recently, many of the separation-of-powers models detailing the legislative-judicial relationship have come to examine the important informational function that the courts' judicial review provides to Congress (Linde 1976; Rogers 1999; Rogers 2001). Policy-making is an inherently empirical endeavor, which is initiated by Congress in an effort to remedy a particular problem and involves that body gathering data on the problem, expert testimony, cost estimates, and legal opinions, among other data points, in an effort to craft legislation designed to effectively and lawfully address the identified problem. In evaluating this evidence, however, the courts and the legislature are in unique positions that are not easily interchangeable, with the courts having a unique vantage point that can be understood as an asset to Congress. Given the stage at which the courts enter the policy-making process, they have the advantage of drawing upon not only much of the same information that Congress relied upon in crafting the law in the first place, but they can also draw upon the actual experiences of a real-life litigant interacting with the law out in the world. This sentiment was captured well by one leading legal commentator, who noted:

When a court decides the constitutionality of a statute in the course of litigation, it is functioning as an agency of sober second thought which reviews in the light of experience under the statute the determination of policy made by the legislature and executive at a time when the effects of the statute could only be predicted. Its decision on the constitutionality of the statute is based on legislative facts, which make up the economic and social pattern in which the statute operates, and adjudicative facts peculiar to the case before the court.

(Rogers 1999, 1311). Judicial review can thus be understood as adding information to the policy-making process that can become critical to the future viability and scope of any law.

The information supplied by the Court, I argue, is not lost in a vacuum; rather, Congress incorporates at least some of this information in revisiting a particular law in an effort to save, expand,

or refine that law. Commentators on the Court-Congress relationship have long understood their interactions as a dynamic relationship with Congress passing laws challenging the Court's views on particular matters and the Court's interpreting or striking down legislation that affects the scope of statutes developed by Congress (Fisher 1988; Pickerill 2004). This has lead at least one scholar studying this relationship to note that "Members of Congress appear to pay close attention to the Court's opinions" as the "Court does play a special role in illuminating...Congress" (Pickerill 2004, 58). Game theorists modeling legislative-judicial interactions have more recently come to incorporate the informative role played by the courts and how that inspires corresponding moves by Congress as it refines the laws commented on, and perhaps struck down by, the courts (Marks 1989; Eskridge 1991; Rogers 2001).

The idea captured in these models is that there is a type of signaling going on between Congress and the Court that permits Congress to fix or eliminate poorly crafted legislation in addition to encouraging bolder initiatives by Congress with the knowledge that the Court can veto the law if any unforeseen or undesirable contingencies are realized (Rogers 2001). When Congress engages in this process of statutory revision, with the assistance of the courts and federal agencies, resulting in an improved state of the law, it, like the courts, enhances its legitimacy in the lawmaking process and expands or strengthens state authority as a result of effectively performing one if its assigned tasks.

#### *Policy-Making Models of the American State*

The conditions that permit, and even encourage, legislative productivity in a constitutional system dominated by a separation-of-powers system has been, and remains, a critical puzzle for scholars of American institutions. Historically, much of the scholarship condemned this system on the ground that it resulted in incoherent and fractured policies, and only through responsible party government was the American system saved. More recently, however, scholars have come to accept

the separation-of-powers framework for what it is and shown, empirically, that productivity and coherence are not necessarily sacrificed in such a system. Political positivists have focused on the act of bargaining as a key mediating force for bringing the branches together to produce coherent policies at regular intervals in spite of a group of political actors with divergent interests who have an underlying goal of maximizing their *a priori* preferences. Pluralists celebrate the multiple access points that the separation-of-powers system creates, permitting more opportunities for society to penetrate, and influence, the state and the public policies it is able to produce.

Common to both assessments of political behavior, however, is a claim that policy making is *universally* the product of one of these competing paradigms. For political positivists, the claim is that the constant driving force behind policy development is the atomistic and preference-maximizing state actors who compete and bargain with one another to achieve the most desirable outcome. For pluralists, state authority is perpetually under bombardment from the public, and society's ability to penetrate the state apparatus is the motivating mechanism behind policy development. This dissertation, in presenting the Cooperative/State-Centered Model, refutes both models not because either of them inaccurately depicts how policies are developed some of the time. Rather, in addition to laying out a competing model that, in and of itself, can explain an important component of the inter-branch policy-making process, the existence of such a model also seeks to refute the universalist perspective on policy-making that these earlier models have always assumed.

The cooperative/state-centered model is built on a different set of assumptions. Actor behavior within the confines of this model is understood to operate from a premise that in certain, and important, instances there is a desire among the political actors across the branches to both effectively implement public policies while at the same time enhancing the legitimacy of each institution by maintaining fidelity to a core set of principles. With the Supreme Court, for instance, that legitimacy is

centered on a (perceived or actual) politically detached and independent set of judges who decide cases based on an analysis of the facts and law in front of them (as opposed to their politically or personally held beliefs). Needing to stay within these conventions in order to maintain their legitimacy, some of the behavior of these political actors takes on a far more cooperative tone, as they work with one another to accomplish a common goal of effective and efficient governance that neither branch could achieve in its own right. The data and arguments presented in the forthcoming chapters undertake an effort to establish a space for this model in explaining key aspects of governance in America.

In seeking to establish this space for explaining policy making in America, the cooperative/state-centered model does not attempt to advance the notion that it explains governance and policy making in all, or even the majority, of the cases. Rather, this model, like the competing ones advanced by pluralists and political positivist, operates best and explains the behavior of governmental actors when certain conditions are present and dominant within the American political realm. There are two critical variables in evaluating when each of the models is most dominant in explaining the process by which public policies are produced. The first variable consists of the state of party politics across the branches of the federal government. For purposes of these models, party politics can be understood to exist in three distinct spaces. Party control can be unified across, or within, the branches. Separately, party control can be divided, either within Congress itself or across the branches. Finally, there are some instances when party unification and loyalty is transcended. The most poignant example of this scenario is when there is an exogenous threat to the safety and security of the country. The dominant model of policy-making is thus, in part, dependent on the state of party politics within the federal government.

The other variable influencing the policy-making process is the public's overall attentiveness on a particular issue. Public attention is itself generated as a consequence of two independent components. The issue, irrespective of the public's underlying views, may be something that generates

considerable interest. For instance, going to war as a result of an invasion or attack likely would generate considerable public attention regardless of the presence, or absence, of any controversy over the war decision itself. Public attentiveness can also, independently, be the product of deep individual or group divisions over an issue. When any controversy over an issue is itself heightened, even when not originally a subject of public concern, this increased tension can generate higher levels of interest that enhance public attentiveness. If we can then imagine the level of attention that the public overall devotes to a particular matter ranging from a very low point, with little or no attention being paid to an issue, to a high point of maximum involvement and concern, the conditions under which each model may be dominant can be better understood.

Each of the models can then be understood to most accurately depict the policy development process under each of the following conditions:

1. The Democracy Model (Pluralism): When the political branches of the federal government, particularly in Congress, are strongly unified, and public attentiveness is high, then the pluralist model most accurately depicts what policies may be generated and their relative success. Political actors are highly responsive to the intensity of the electorate on an issue because of the level of attention being paid to it, and when there is a unification of party control then it becomes easier for that constituency to penetrate the state apparatus and influence policy-making. The key motivating factor influencing the development of public policy, therefore, is derived from the public's desires and its ability to penetrate the various contact points across the federal government.
2. The Competitive/Institutional Model (Political Positivism): When the federal government is divided across party lines, particularly when this division exists in Congress, and the public's opinion on an issue measures at low levels of interest, meaning they are largely inattentive, then the competitive model is dominant. In this environment, political actors can best achieve, and are most willing to seek out, their preferred-position on a particular issue in order to satisfy their own personally-held beliefs or that of a valued constituency. The central motivating mechanism behind the actions of political actors as they develop policies is the relative allocation of institutional rights and authorities and the personal reelection prospects of each of those actors.

3. The Cooperative/State-Centered Model: When there is an alignment of attitudes across the branches of the federal government that transcends party politics, then the state-centered model is dominant. Political alignments are strongly influenced by public attentiveness, and such alignments can occur in two principal circumstances. Public attentiveness may, in and of itself, be high on a particular issue, but if those opinions are uniformly, or nearly uniformly shared, then this can promote political alignment across the branches as well. The branches, under these circumstances, will work with one another to give effect to this strongly held belief. Separately, if public attention is itself low on an issue, the lack of public pressure frees up the political branches to work with one another to achieve a shared goal or enhance their own authority and legitimacy. In either instance, the primary mechanism motivating behavior is an effort to enhance or retain state authority.

The goal, therefore, in articulating the contours of the cooperative/state-centered model and its relationship with the two dominant policy-development models to date (the democracy and institutional/competitive models) is two-fold. In creating a space for a new policy-making model, it undermines the universalist perspective advanced by previous approaches and helps to identify the conditions under which each of these competing models is likely to be most dominant. In addition, the cooperative/state-centered model itself advances a new set of assumptions concerning the behavior of political actors that operates from the premise that there is a desire among these actors to effectively implement government policy (including fixing problems in earlier iterations of public laws) and to simultaneously advanced the institutional authority of each of the branches by adhering to the core principles by which each institution claims its legitimacy. All states, I argue, must be concerned with the promotion of effective governance and enhancing and securing the legitimacy of the institutions making up the state. The cooperative/state-centered model incorporates those concerns and provides a framework for understanding the cooperative efforts of political actors that are the subject of this dissertation.

#### *Uncovering Coordinate Cooperation in Lawmaking & Governance*

The core problem confronted in this dissertation is how best to understand the interaction between the branches in the lawmaking and governance process and what role, if any, the judiciary plays in such a process. I have argued, so far, that much of the scholarship to date, which in seeking to

## Chapter 1: Ordinary Governance: A Framework for Lawmaking in America

solve this puzzle has largely revolved around what I have labeled as either the democracy or competitive/institutional models, is incomplete for failing to take into account the role played by the judiciary in this process and the ongoing presence of cooperative behavior among actors across the branches as they seek to enhance the legitimacy of the institutions they represent and the authority of the state as a whole. Much of Chapter 1 has been devoted to establishing a theoretical space for this competing model of cooperation and establishing the conditions upon which each of the models is most forceful in explaining the dynamics of interbranch relations and the policy development process. The remaining questions include: (1) whether any persuasive data exists to support this competing cooperative/state-centered model; and (2) whether such a framework can generate any testable hypotheses concerning interbranch behavior that can be analyzed empirically. The remainder of the dissertation seeks to resolve those questions.

Part II (Chapters 2 and 3) begins this odyssey by developing and analyzing a comprehensive database of reaction bills (legislation that is at least in part responsive to one or more federal court decisions) in Congress spanning a 40-year time period, between 1967 and 2008. The database itself represents a significant contribution to cataloging and detailing the scope of such legislation and the extent to which it is emblematic of a broader relationship between the branches of government in the context of lawmaking. Much of the analysis in these two chapters, therefore, will focus on demonstrating that Congress does regularly respond to statutory decisions by federal courts and initiates responsive legislation to those decisions that modifies existing statutes, or creates new ones. Not only do reaction bills encompass a measurable component of the significant pieces of legislation produced by Congress, but they also implicate a sizeable portion of the Supreme Court's decisions issued each term, demonstrating how these bills represent an important component of interbranch activity within the realm of public policy development. Chapter 3, in particular, goes on to meticulously detail the behavior of members of Congress as exhibited within these reaction bills and what



contributing factors can be understood as motivating their actions in these cases. One of the central ideas advanced at the end of this section is the notion that members of Congress are in regular communication with actors in the other branches as part of an interactive dialogue in the lawmaking process.

In Part III (Chapters 4 and 5), I transition to examining the behavior of Supreme Court justices in their opinion writing, which information is revealing in its own right, but it also serves as a preface to answering the main empirical question posed in this dissertation: why does Congress react to Supreme Court decisions through reform legislation? From the framework outlined above, I develop and test a new theory labeled as “interbranch signaling” as a basis for motivating Congress to respond to federal court decisions through reform legislation. This approach is in contrast to the two main theories developed, to date, which emerge from the dynamic tension framework and what it predicts as to why Congress is motivated to respond to judicial cases. The data outlined in this section will show that the justices regularly engage in behavior that I label as “judicial signaling” wherein they invite congressional intervention into an underlying statutory framework that they believe must be revisited as a consequence of a decision just issued by the Court. These signals, I show, can be found in the written opinions themselves, and serve as an important communicative tool used by the justices to shape the direction of public policy. The executive branch can also use these same cases to signal its intention or desires to Congress.

After developing this comprehensive database on all Supreme Court decisions between the 1986 and 1995 terms, combined with all the data on reaction bills, I am then able to empirically develop several models of behavior by including a suite of metrics associated with the competing theories highlighted above in order to objectively ascertain which theory best explains the interaction between the Supreme Court, the Executive, and Congress in the context of reform legislation. I will show through

model selection that interbranch signaling is the most parsimonious model to account for the interactions between the branches in this environment. Answering the question why Congress selects certain Supreme Court decisions to react to through reform legislation, I believe, is central to understanding the lawmaking process as well as how governance takes place in a country defined by a separation-of-powers framework. While this constitutional framework has done remarkably well at combating tyranny, it has also, despite many criticisms lodged against it over the years, developed into a unique and productive system of governance that has allowed the branches to work together in spite of the natural antagonisms built into the American system of government.



## Chapter 2

We have justified our practice of according special weight to statutory precedents ... by reference to Congress' ability to correct our interpretations when we have erred. ... Given the frequency with which Congress has in recent years acted to overturn this Court's mistaken interpretations ... its failure to enact legislation to overturn [our recent case] appears at least to some extent indicative of a congressional belief that [this case] was correctly decided. It might likewise be considered significant that no other legislative developments have occurred that cast doubt on our interpretation....

--*Patterson v. McLean Credit Union*, 491 U.S. 164; 109 S.Ct. 2363; 105; L. Ed. 2d 132 (1989) (Brennan, J. Dissenting).

In Part I of the dissertation, a competing framework was described for understanding how governance takes place, and how the State operates, within a political apparatus defined by the separation-of-powers system and through a branch of government—the courts— that is seemingly undemocratic. It was argued that much of the policymaking environment, where statutes are crafted, interpreted, and adjudicated and the branches of government interact with one another in that process, can be understood as being far more coordinated, cooperative, and interactive than previously recognized. In addition to the assertion that there is far more cooperation in the lawmaking process, the claim was also made that the judiciary, and executive, have been invited, by Congress, into an active and important policy making role and that the feedback and concerns provided by both branches are important in shaping the direction of statutory law in America.

The foundation for such a framework is built on five central claims. To summarize, it assumes that the different branches regularly interact with one another in crafting and continuously reconstituting the nation's statutory laws. Additionally, within the process just described the various political actors communicate with one another to identify areas of concerns, gaps in the law, or issues that may deserve further consideration. Any plausible framework for governance, however, must be grounded in reality and have underlying data and an empirically derived basis of support. Earlier, it was suggested that evidence for such a notion can be found in reaction bills where Congress seeks to

## Chapter 2: The Significance of Reaction Bills

override, modify, or codify decisions by the federal courts through reform legislation. Before discussing the details of these bills and why they support this approach to lawmaking and governance, it is imperative to first establish that these bills occur with enough frequency and have at least some impact on the behavior of congressional and judicial actors to warrant such a conclusion. This chapter addresses those topics.

The arguments advanced in this chapter proceed sequentially with several layers of analysis designed to show the frequency with which reaction bills occur, their importance on the overall lawmaking process, and their impact on the behavior of members of Congress and the Supreme Court. After detailing how information on reaction bills was collected by studying congressional committee reports, I argue that while reaction bills only represent a small percentage of the total legislative activity of any one congressional term, they occur with enough frequency and regularity to constitute an important component of congressional and judicial relations as part of the broader lawmaking equation.

To supplement and expand on this point, the next section examines the number of reaction bills in comparison to the amount of legislation that has been classified as “significant” or “important.” Relying on a concept and approach first deployed by David Mayhew (1991) and Charles Cameron (2000) as well as a parallel idea developed by Baumgartner and Jones (2002), a comparison of the total number of reaction bills and laws with what the former pair of authors refers to as “significant legislation” and the latter pair of authors call “important laws” is done. Classifying legislation in this manner recognizes the fact that “the majority of legislative activity of genuine significance is concentrated in a relatively small number of important bills” (Cameron 2000, 24). When compared against significant pieces of legislation, the true importance of reaction bills becomes more apparent.

Also analyzed is the relatively high frequency by which Supreme Court decisions are responded to in Congress, suggesting that reaction bills are one of the primary means by which these branches

interact. Finally, actual text from various Supreme Court decisions and congressional committee reports is discussed to offer additional evidence that actors within these two branches are aware of, and actively monitor, the behavior by each of the respective branches that can be seen as responsive to actions by the other branch.

### The Data

Identifying reaction bills is the first step in the data collection process, but there is no simple and straightforward approach to making such identifications. On rare occasions Congress will, typically in the preamble of a new statute, make a specific reference, within the text of the legislation, to one or more court cases that the statute is designed to overrule or modify. But this type of legislative activity constitutes the exception and not the rule. To locate the majority of bills that can be characterized as “reactionary,” the process is far more complex. The central problem is that, as just discussed, the actual text of any particular statute rarely makes reference to a particular court case. This is partially because legislation is often written in the affirmative, specifying that a particular word is to mean “X” or behavior “Y” is prohibited, rather than saying court decision “Z” was wrongly decided or misconstrued the meaning of a particular statute.

To discover the broader purpose of any particular statute or the background behind its creation, it is often necessary to consult its legislative history.<sup>1</sup> Congressional and legal scholars who study the construction and interpretation of statutes often advocate on behalf of relying on a bill’s, or law’s,

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<sup>1</sup> The “legislative history” for any bill is typically understood to include the information collected in the official *Congressional Record* as well as other official publications such as Committee Reports. The *Congressional Record* is divided into four parts. The first two parts include all actions on the floor of the House of Representatives and Senate, specifically including debates and statements made on the floor of each chamber, as well as records of various parliamentary actions and roll call votes. In addition, it contains communications from the President and the executive branch, memorials, petitions and information about legislation, including amendments. The third section is labeled as the Extension of Remarks, and generally includes additional legislative statements not actually delivered on the House floor, as well as extraneous material, such as texts of speeches delivered outside Congress, letters from, and tributes to, constituents and newspaper or magazine articles. The final section is the Daily Digest, and it includes extensive reports on chamber activities in the Senate and House as well as actions taken by the various committees within these chambers.

legislative history in an effort to determine meaning and congressional intent, and, while controversial, members of the federal and state benches regularly consult the legislative history of a law when asked to decide the meaning of a particular statute (*See, e.g.*, Eskridge and Frickey (1990); Gely and Spiller (1990); Eskridge and Ferejohn (1992); McCubbins (1991); Schwartz, Spiller, and Urbiztondo (1994); McNollgast (1994)).

Though a statute's legislative history represents the most logical and authoritative area to search in order to determine whether one of the purposes of such statute was to respond to one or more court cases, searching that history presents a practical problem due to the voluminous record many statutes, and the broader bills they are embedded within, generate. Most bills that are given consideration by any of the dozens of committees in the House or Senate generate a legislative history that can often include hundreds if not thousands of pages of materials for any given bill. When that is compounded across the several thousands of bills that are subject to committee consideration in an average Congress, and then again across terms of Congress, the amount of material one must search to locate the pertinent language quickly approaches the hundreds of thousands and eventually millions of pages mark. Thus, conducting any type of comprehensive search of this material presents a major logistical challenge in and of itself.

Past studies have been incomplete in presenting an overall picture of congressional activity in the area of reaction bills. This is due, in part, to the volume of data that must be searched so as to identify reactionary elements in the bills based on their legislative history. A number of early studies that attempted to collect data on reaction or override bills were largely unsystematic and relied on a hodgepodge of data. Some of the early sources for collecting data on reaction bills included interviews of Harvard Law School faculty, selective searches of the *Congressional Quarterly Almanac*, and law

review articles.<sup>2</sup> While this approach has a historical foundation, it is largely anecdotal and admittedly made no effort to systematically account for the entire universe of reaction or override bills. More recent work has been more empirically rigorous by relying on a research method that utilizes Supreme Court decisions to identify congressional responses. Examples of this work include Henschen & Sidlow (1989) who identified the Supreme Court's decision on labor and antitrust cases between 1950 and 1972 and then identified bills in Congress that were responsive to those cases during a similar time span. Likewise, Meernik and Ignagni (1997), and more recently Pickerill (2004) identified "judicial review" cases across an approximate 35 and 40 year time span, respectively, where the Supreme Court struck down all or part of a federal statute on constitutional grounds, which action in turn initiated a congressional response.

These more recent studies do an excellent job at analyzing the implications and meaning from these types of interactions between Congress and principally the Supreme Court, but in terms of identifying a comprehensive list of most reaction bills in Congress they are fatally flawed for three reasons. First, the focus of these studies is exclusively on decisions by the Supreme Court that receive congressional responses, which by definition excludes all cases by lower Article III courts and Article I courts that may be subject to a reaction bill. The data presented later in this chapter, as well as subsequent chapters, will demonstrate that a considerable amount of reaction bills are generated from cases in these latter categories. Thus, by definition, if no effort is made to search all of those cases, a considerable amount of reaction bills will necessarily be missed, undermining efforts to understand the process in its entirety. Second, these authors generally only look at cases that involve constitutional

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<sup>2</sup> Some of this prior scholarship has included Thomas R. Marshall, *Policymaking and the Modern Court: When Do Supreme Court Rulings Prevail?*, 42 W. Pol. Q. 493 (1989); Harvey P. Stump, *Congressional Response to Supreme Court Rulings: The Interaction of Law and Politics*, 14 J. Pub. L. 377 (1965); Harvey P. Stump, *Congressional Reversals of Supreme Court Decisions: 1945-1957*, 71 Harv. L. Rev. 1324 (1958); Carol F. Lee, *The Political Safeguards of Federalism? Congressional Responses to Supreme Court Decisions on State and Local Liability*, 20 Urb. L. 301 (1988); Abner J. Mikva and Jeff Bleich, *When Congress Overrules the Court*, 79 Cal. L. Rev. 729 (1991).



matters and involve the Supreme Court's exercise of judicial review. As detailed in the next chapter, however, more often than not reaction bills represent a congressional response to how one or more courts have interpreted a particular statute without a declaration that the statute is unconstitutional. For example, the Supreme Court may interpret a phrase in a particular statute to mean one thing, but the current Congress may disagree with that interpretation and re-write the statute to adopt a different definition. Such cases are not picked up by a methodological approach that only focuses on Supreme Court cases finding a law to be unconstitutional. Finally, a sizeable number of reaction bills, as will be demonstrated in the next chapter, seek to modify or codify an interpretation given to a statute by one or more courts and would thus be missed if one were only to examine cases where a statute is invalidated. Instances where Congress only makes slight modifications to a statute at issue in a particular case or codifies part of the meaning of a particular statute based on the opinion of a judge or justice are equally compelling and worthy of study. For these reasons, in an effort to develop a more comprehensive accounting of all reaction bills in Congress, a more sophisticated methodology is required.

### Committee Reports

In an effort to develop a more comprehensive methodological approach to locating reaction or override bills, I follow a technique first developed by William Eskridge (1991) that examines and analyzes committee reports as the primary resource for locating reaction bills. These reports represent the most comprehensive congressional resource for locating information on a bill or statute's purpose or design. This is due, in part, to the unique position that committees hold in the legislative process and the significance of the reports the committees produce. Before any bill can be voted on by all members of the House or Senate, it must be first developed and reported on by one or more committees.<sup>3</sup> When

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<sup>3</sup> Typically, a bill that is sent to the full chamber is "reported favorably" on by the respective committee and then "calendered" for debate and a floor vote according to the rules of each chamber. But, on occasion, committees will

most bills emerge from committee, they are required by rule, with certain exceptions, to be accompanied by a report on that bill from that same committee. Under House Rules XI and XIII and Senate Rule XXVI, the chairperson of any committee must file with the entire chamber a report, generally within seven days after the bill has been filed with the clerk of the committee, detailing the history of the bill within committee in a singular report.

These reports, as a matter of custom, and for certain items must, contain information summarizing the purpose of the bill, detailing the text of the new statute and any amendments it makes to existing law, the anticipated financial costs of the bill in the current, and next five, fiscal years, any regulatory impact the bill may have, an explanation of any testimony and written documents received by the committee on the bill, and any minority views on the legislation. The committee report, logically, therefore is the best place to locate any language about the bill's impact on any court cases, much more so than other areas of legislative history such as transcripts of witness testimony or transcripts of the floor debates.<sup>4</sup> Put simply, the report is where the committee summarizes its activities in crafting the bill and the impacts it believes the bill would have on other areas of the law. Within this one document, therefore, exists the most comprehensive and relatively concise statement as to the purpose and intended effect of the bill, and the report is transmitted largely contemporaneously with the bill itself to the entire chamber for review prior to any floor debate over, or vote on, the bill.

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report "unfavorably" or "without recommendation" on a bill and allow for it to be calendered even though the committee is voting against passage.

<sup>4</sup> While a focus on committee reports represents a comprehensive approach to identifying reaction bills, it will invariably miss some bills that could be fairly characterized as such. The actual text of the bill may make a reference to its effect on one or more court cases, which may not be picked up in the report itself. Additionally, there are other documents that make up a bill's legislative history, such as hearing transcripts or records of floor debates where discussions of a bill's reactionary elements may be discussed, which information does not make it into the committee report. Acknowledging this deficiency, however, I still maintain that the committee reports are the most likely single and most comprehensive source of information for locating information on any given bill that would indicate its reactionary quality. I make no claim, however, that the list of reaction bills presented in this dissertation is the complete universe of such bills. Nonetheless, given the resource limitations in this project, I believe it is the closest approximation to the entire set of bills that could reasonably be collected at this time.

## Chapter 2: The Significance of Reaction Bills

While, as a factual matter, committee reports may represent the most logical resource for identifying whether a particular bill or statute is designed to react to one or more court cases, there is a considerable degree of controversy among legal and judicial scholars as to the broader meaning of “legislative history” and whether it is appropriate to rely on information and statements produced by committees, such as their official reports, as a proxy for “congressional intent.”<sup>5</sup> The primary justification for relying on the reports produced by congressional committees to determine the purpose of a particular bill is that the committee system itself lies at the center of how Congress, as a body, has chosen to organize itself and go about its primary task of producing legislation. For those studying Congress and how it functions as an institution, the committee system is placed at the center of many of the main models within this congressional organization literature. One of those models, the *distributive* view, posits that the committee system has been a key design feature in Congress in order to maximize benefits and help guarantee the re-election goals of members (Weingast and Marshall 1988). Separately, the *informational* model (Gilligan and Krehbiel 1987; 1989; Krehbiel 1991) posits that committees solve a central problem faced by any legislator, which is to produce reasonable policies in a complex environment by bringing together different subject-matter experts and putting them on committees that are designed to produce legislation within that area of expertise. Committees did not emerge in Congress by accident or constitutional mandate. They were deliberately created by legislators to achieve various goals, among those were to allow legislators to specialize in a few policy areas and in turn produce legislation in those areas of subject matter expertise. The particular motivations behind this decision are less relevant for my own purposes, but this does not change the

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<sup>5</sup> See, e.g., Stanley E. Fish, *Is There a Text in this Class? The Authority of Interpretive Communities* (1980); Roberto M. Unger, *Knowledge and Politics* (1975); Frank Easterbrook, *Statutes Domains*, 50 U. Chi. L. Rev. 533 (1983).

fact that members of Congress view committees as an invaluable tool for producing and reporting on legislation.<sup>6</sup>

In addition to producing the text of the legislation itself, one of the other main functions of a committee is to report back to the other members of Congress the process by which the bill itself was developed and considered. The primary source for this information is the committee report. As discussed earlier, committee reports generally contain a wide range of information on the development, purpose, and impact of the bill, and the reports themselves are made available to the broader membership typically before any floor votes. Much of the literature that has examined congressional behavior has found evidence to support the idea that the information produced by committees is critical in facilitating the decision-making process by members of Congress (Fenno 1973; Shepsle 1979; Weingast 1979; Krehbiel 1991). How often the broader congressional membership read these reports, and how much detail they read or absorb when they do review the reports, does not undermine their utility or mean that they should not be understood as reasonable approximations of congressional

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<sup>6</sup> Among legal scholars and members of the bench, there has been considerable criticism of the notion that committee reports somehow represent the intent of Congress and the actual text of the statute. In responding to this critique, I follow the rebuttal made to this same point by McCubbins, Noll, and Weingast (McNollgast) (1994, 11) who observed: “But this view is simply one version of the more general delegation problem, and it does not take into account the lessons of principal-agent theory. The observation that committees and their staffs do most of the legislative work and that the floor majority rarely inspects all of their efforts implies nothing about whether the floor majority has abdicated its formal role. If the floor has created effective incentives for its committees and staff in its structure and process, it need not constantly monitor their work product to assure compliance with the interests of the floor majority. Again, the contracting analogy is useful. One cannot argue that a contract between two parties does not embody their mutual agreement because both parties delegated the negotiation to their lawyers and then signed it after only superficial perusal of its contents. Presumably clients delegate the job of negotiating contracts to their lawyers because they can rely on the incentive structure of the attorney-client relationship. This reliance enables them to obtain the expertise of a lawyer without fearing that their interests will be ignored in drafting an agreement. The same logic applies to decisions by a legislature on its structure and process.” Offering a similar argument, former-Justice Stevens stated in a concurring Supreme Court opinion that “[l]egislators, like other busy people, often depend on the judgment of trusted colleagues when discharging their official responsibilities. If a statute...has been carefully considered by committees familiar with the subject matter, Representatives and Senators may appropriately rely on the views of the committee members in casting their votes. In such circumstances, since most Members are content to endorse the views of the responsible committees, the intent of those involved in the drafting process is properly regarded as the intent of the entire Congress.” *Bank One Chicago v. Midwest Bank & Trust Co.*, 516 U.S. 264, 276-77; 116 S. Ct. 637; 133 L. Ed. 2d 635 (1996).

intent.<sup>7</sup> Congress, as a body, delegates its broader lawmaking power to individual committees in order to take advantage of the subject-matter expertise that those committees, and the members therein, offer. Even if the members-at-large do not read the reports, the original decision to delegate this authority is enough to qualify the work of these committees as the functional equivalent of any broader “congressional intent.”

This general understanding as to the importance of committees and the reports they produce is also well-recognized by members of the Supreme Court who are regularly tasked with the responsibility of interpreting the meaning of particular statutes. As stated by former Supreme Court Justice John Paul Stevens in one of his opinions:

The purpose of a committee report is to provide the Members of Congress who have not taken part in the committee's deliberations with a summary of the provisions of the bill and the reasons for the committee's recommendation that the bill should become law. The report obviously does not have the force of law. Yet when the text of a bill is not changed after it leaves the committee, the Members are entitled to assume that the report fairly summarizes the proposed legislation.<sup>8</sup>

Echoing this same sentiment, in the separate case of *Garcia v. United States*<sup>9</sup>, the majority stated “when resort to legislative history is necessary, it is only committee reports, not the various other sources of legislative history, that should be considered.”<sup>10</sup> Continuing on in this same opinion, Chief Justice Rehnquist found that “[i]n surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature’s intent lies in the Committee Reports on the bill, which ‘represen[t]

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<sup>7</sup> Among those who criticize any reliance on a law’s legislative history, they often point out that most members of Congress rarely read the committee reports before voting, thus it is illogical to conclude that the report somehow captures “legislative intent.” Consider, for instance, Justice Scalia’s concurring statement in the Supreme Court’s decision of *Bank One Chicago v. Midwest Bank & Trust Co.*, arguing “even if subjective intent rather than textually expressed intent were the touchstone, it is a fiction of Jack-and-the-Beanstalk proportions to assume that more than a handful of those Senators and Members of the House who voted for the final version of the... Act, and the President who signed it, were, when they took those actions, aware of the drafting evolution that the Court describes; and if they were, that their actions in voting for or signing the final bill show that they had the same ‘intent’ which that evolution suggests was in the minds of the drafters.” 516 U.S. at 279.

<sup>8</sup> *City of Chicago, et. al. v. Environmental Defense Fund et. al.*, 328; 114 S. Ct. 1588; 128 L. Ed. 2d 302 (1994) (Stevens, J. Dissenting).

<sup>9</sup> 469 U.S. 70, 83 L. Ed. 2d 472, 105 S. Ct. 479 (1984).

<sup>10</sup> 469 U.S. at 76.

the considered and collective understanding of those Congressmen involved in drafting and studying the proposed legislation’.”<sup>11</sup> While there is a lively debate among scholars and jurists about the utility of “legislative history” for purposes of statutory construction, these pronouncements from the Court evidence the fact that among those who rely on Congress’ legislative history, the committee reports lie at the center of an effort to determine the meaning and purpose of the bill.<sup>12</sup>

Based on these observations from some of the Court’s written opinions, it is reasonable to view the committee reports as the best approximation of legislative intent and what many members of the Court will themselves rely on when trying to discover the meaning and purpose of a particular law. Congress, recognizing the utility and function of these committee reports in projecting their views of a new law, can use these same reports to signal how it would like the agencies to subsequently implement, and the courts to later interpret, the laws Congress has passed. In the chain of communication between the three branches, the committee report, therefore, is properly understood as the first in a series of signals between the branches as the policy-development process cycles through the various branches.

Employing a method of searching for reaction bills that relies on congressional committee reports is also superior to searching other sources of information, some of which have been relied on by earlier scholars writing on this topic. One approach might be to rely on the actual text of the statute.

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<sup>11</sup> *Id.* (quoting *Zuber v. Allen*, 396 U.S. 168, 186, 90 S.Ct. 314, 24 L.Ed.2d 345 (1969)).

<sup>12</sup> In addition to the arguments outlined above as to why I believe these committee reports offer a reasonable approximation of “Congressional intent,” my purpose in using committee reports to determine whether a particular bill is reactive toward one or more court cases avoids much of this controversy that has embroiled the judicial world on the utility of legislative history for purposes of statutory construction. I am only trying to discover whether a particular bill was intended, by the members of Congress responsible for its drafting, to respond to one or more court cases. The analysis is not contingent upon whether the actual text of the legislation accomplished that stated goal, although in most, if not all, cases it indeed does. This purpose, and the meaning derived from each report, is distinct from the core of the dispute among jurists as to whether a statute’s legislative history is relevant for determining the meaning of a word, phrase, or passage in the law that is at issue in a particular case. The utility of a law’s legislative history for purposes of interpreting the statute in litigation is distinct from my own goal in this project, which is to determine whether the intent of a bill, as specified by those responsible for its drafting, was designed to react to one or more court cases.

## Chapter 2: The Significance of Reaction Bills

Reading only the plain text of the statute itself, however, will result in any researcher missing most of the statutes that are at least in part designed to respond to one or more court cases. Sometimes Congress will specify its purpose and findings in the statute itself, but this is not a universal practice and even when it does occur and the statute is reactionary it does not always mean that Congress will specify the court case in that statement of findings. Rarely do the operational provisions of a statute mention a specific court case either. Thus, reviewing only the text of the statute would result in most reaction bills/laws being missed.

Also, as noted earlier, relying on the court decisions themselves as the basis for locating reaction bills is problematic. In combination, the federal courts decide hundreds of thousands of cases each year, all of which would need to be searched if one decided to use this resource as the basis for a search. The logistical difficulties of such a search are obvious. Also, searching the court cases as the basis for identifying reaction bills/laws only makes sense if it can be assumed that Congress only reacts to decisions by the Court to strike down a law. But, many of the responses in Congress do not come from decisions invalidating a law. Targeting only those cases in which the court has invalidated a law will necessarily miss a critical subset of cases. Such cases include instances where a congressional response only modifies, but does not overrule, the court's interpretation of a statute, or those cases where Congress codifies the court's interpretation. The search for reaction bills/laws has to be centered within Congress itself, and the document produced by Congress that is most likely to have information identifying a particular bill as a "reaction bill" is the committee report.

### Identifying the Reaction Bills

Coincidentally, one of the key advantages in relying on committee reports for collecting data on reaction bills is that for each bill that is produced by a committee there is only one accompanying

report.<sup>13</sup> While any one report can often be hundreds, if not (on occasion) thousands of pages, in comparison to the complete congressional record for any one bill (which includes letters and statements from interested parties, transcripts of witness testimony, and floor debates) the committee reports are relatively more manageable in size. Nonetheless, the volume of data that must be searched is still quite staggering. Between 1985 and 2008, wherein all available committee reports in electronic format were searched, nearly 14,000 reports<sup>14</sup> were located, estimated to total over one-half of a million pages. On average, each Congress (i.e. the 110<sup>th</sup> Congress) produced 1,387 reports<sup>15</sup>, corresponding with the total number of bills to emerge from each of the committees in the U.S. House and Senate, including joint and special committees comprised of members of both chambers.

To effectively and efficiently manage all of this data, I relied on a qualitative software tool called Atlas.ti. Atlas.ti is a proven and well-regarded software package designed to conduct qualitative research on any primary document that is either a text, image, video, or audio file.<sup>16</sup> The software allows the user to code any number of terms, phrases, or combinations thereof and then search all the documents for occurrences of the user-specified terms or phrases. The query tool within Atlas.ti then permits users to employ different operators to search for documents that contain various combinations of the specified terms and phrases. All of the research parameters for discovering reaction bills within

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<sup>13</sup> Some bills may be considered by separate committees within, and between, chambers, and in such situations it is possible for multiple committee reports to be produced on substantially similar bills. Also, for example, conference committees that reconcile competing bills from the House and Senate also regularly produce reports. Thus, one bill may, in the end, have multiple committee reports attached. But, my point is that each committee only produces one report per bill as opposed to the potential dozens of witness statements and transcripts of testimony that may also accompany any given bill as part of its legislative history.

<sup>14</sup> This figure reflects a close approximation to the actual number of committee reports that I downloaded and searched, but it does not represent the actual number of committee reports that were produced during this time period. This is due to the fact that before 1990 all committee reports were not made available in an electronic format. As a result, prior to 1990 (i.e. 1985-1989) I only had access to committee reports as they were reprinted in the U.S.C.C.A.N. volume produced by West Publishing. As discussed earlier, U.S.C.C.A.N. only collects committee reports on important pieces of legislation. For the period of 1985-1989, thus, I only collected somewhere between 100-200 reports per session of Congress. In comparison, from 1990-2008 the number of reports collected per session ranged from 438 to 969, with an average of 693 reports per session of Congress. The exact number of reports from 1985 to 2008 comes to 13,826.

<sup>15</sup> This figure represents the average number of reports between 1990 and 2008.

<sup>16</sup> A list of the major worldwide universities, research institutions, and corporations that use this software package can be found at: <http://www.atlasti.com/references.html>



## Chapter 2: The Significance of Reaction Bills

the committee reports using Atlas.ti are discussed in detail in Appendix A. To briefly summarize, the process for identifying these bills consisted of *three main steps*.

First, three main search codes were developed, and within each of these codes were various search terms and phrases that Atlas.ti would identify in the committee reports. One coding scheme, labeled as “reaction,” sought out the occurrence of various descriptive terms like “override,” “react,” “reverse,” “modify,” and codify,” most of which included appropriate root expanders to capture expanded and plural versions of the terms. The second code was called “case,” and it included such terms as “court,” and “judicial,” and “circuit.” The final term was labeled as “reporter” that was designed to find the occurrence of symbols and terms that are often used in case citations, such as “v.” (i.e. Smith v. Jones) and different abbreviations for the various case reporters, such as “F.3d.” The second phase of the search then sought out locations in the committee reports where the presence of these codes occurred in relatively close proximity to one another. The output from this search was a list of committee reports, and specific locations within those reports, where these codes were in close relation to one another, indicating the possibility of a reaction bill. Finally, to verify whether the identified report was indeed connected to a reaction bill, each report was closely reviewed to determine if the bill could be fairly characterized as an effort to reverse, modify, or codify one or more court decisions. For those bills deemed to be “reaction bills,” a wide range of information on each of the bills was recorded, which will be discussed in depth later in this chapter and in Chapter 3.

The process of extending the collection of reaction bills from 1984 back to 1967 proceeded along a different track. Since I replicated much of the underlying process (albeit with a far more comprehensive and sophisticated search method) first patented by William Eskridge, I relied on the data he collected and published in his seminal article, *Overriding Supreme Court Statutory Interpretation Decisions* (1991), for the period between 1967 and 1984 (the 90<sup>th</sup> through 98<sup>th</sup> Congresses). In Appendix

I of his article, Eskridge identified, by number, each of the public laws during this time period that could be classified as overrides, the number in the U.S. Statutes at large that were affected, all federal court cases that were overridden with the new law, and the source for this information, which was typically the House or Senate committee report. With this identifying information, and recognizing that our methods did differ to some degree, I then searched U.S.C.C.A.N. myself to locate all of the committee reports he identified in his article, determined if I concurred with the coding decision by reading the reports myself, and then searched those reports for any additional cases that were not included in his original list. In cases where I could not locate the source document, could not find the referenced decision, or where I disagreed with the coding decision, I did not include those cases within my own data set. In some situations, I added one or more cases that were not included within Eskridge's list. This was generally done where there were attempts to codify particular cases, which Eskridge omitted from his analysis.

Despite some of the distinctions in our approaches and the invariable differences in judgments on whether or not to code a particular bill or case, our lists were highly correlated. Between the 90<sup>th</sup> and 98<sup>th</sup> Congresses (1967-1984), Eskridge cited to 218 different cases that were subject to override statutes. I agreed with the coding decision, and subsequently included in my own list of cases, 193 of those same cases, providing for an overall match on 89% of the cases. Separately, I added 51 additional cases that were not listed by Eskridge to the 193 original cases, many of which were cases that were being codified in the reaction bills.<sup>17</sup> From this perspective, our two lists were in agreement on about 79% of the total cases. While acknowledging some of the differences in the two lists, there is an obvious degree of symmetry between them. This justifies reliance on his original data in expanding the data set for my own analysis and drawing conclusions from this expanded list.

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<sup>17</sup> These cases were located upon a close review of the committee reports identified by Eskridge as an override bill. The same criteria as outlined earlier for delineating between whether a case belonged in the "override," "modify/clarify," or "codify" categories were used when reviewing the reports identified by Eskridge.

## Chapter 2: The Significance of Reaction Bills

Since the two data sets overlap across a span of six years, this allowed me to cross-check my own results (produced through a search conducted within Atlas.ti, as described above) with the list of results generated by Eskridge in an effort to further justify the decision to combine these two lists. For 1985 through 1989, both Eskridge and I relied principally on the same data source—those committee reports reproduced in U.S.C.C.A.N.<sup>18</sup> In 1990, which represents the second session of the 101<sup>st</sup> Congress, I had access to, and searched, all the committee reports that were published in that year and available electronically. Thus, the total amount of bills and cases I located for that one session of Congress is considerably higher than that of Eskridge, as I searched 963 committee reports for that year whereas U.S.C.C.A.N. only reproduced 106 of those reports. As a result, within the 101<sup>st</sup> Congress I located nine additional public laws that were not on Eskridge's list; however, for this same Congress, there was congruity between thirteen of the fifteen public laws that Eskridge had identified with my own research, resulting in a match rate of around 87%. During the 98<sup>th</sup> through 100<sup>th</sup> Congresses, the matches are similarly close. Overall, of the 64 public laws Eskridge located between these three Congresses, my own research found 50 of those same public laws, or around 78%. I located seven additional public laws during this period that were not identified by Eskridge. Overall, my independent search for reaction laws for the 98<sup>th</sup>, 99<sup>th</sup>, 100<sup>th</sup>, and 101<sup>st</sup> Congresses, collectively, returned 80% of the same public laws that Eskridge included within his own list.

While the two lists are not perfect facsimiles of one another, the overall similarity is strong enough to justify their combination. Some of the discrepancies between the lists are the result of selective searches Eskridge performed of the broader congressional record, which I did not do as I limited my search only to committee reports. In some instances, I was simply unable to locate the source document he had identified within my own search of the U.S.C.C.A.N. database on

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<sup>18</sup> Eskridge supplemented his primary search of U.S.C.C.A.N. with a selective search of hearing transcripts and secondary sources, which I did not do, but the vast majority of his data was drawn from, and can be found within, U.S.C.C.A.N.

“westlaw.com.” I also had the added benefit of being able to conduct the search of these documents electronically using software designed for this very purpose; whereas Eskridge, with a team of researchers, had to conduct the searches by hand. With the volume of documents that had to be searched it is not surprising that I located some cases that he and his team most likely just overlooked in reviewing the hundreds of thousands of pages of documents. Most importantly, when we did locate the same documents, which occurred the vast majority of the time, there was a high degree of congruence between the respective coding decisions. In sum, we were both looking for the same type of bills, we largely analyzed the same set of documents to find these bills, and our decisions to code or not code those bills matched one another at a relatively high rate.

### Reaction Bills

The results of this analysis are presented in the tables and figures below. Between 1967 and 2008 (the 90<sup>th</sup> through the 110<sup>th</sup> Congress) there were a total of 733 reaction bills introduced and considered by at least one committee in at least one chamber of Congress. This number includes all bills that were reported on by at least one committee, regardless of the legislative outcome of the particular bill. Later in this chapter I present data on only those bills that become public laws, but it is important to have an accurate count of all reaction bills, regardless of whether they clear all the legislative hurdles to become law. Thus, the analysis begins with Table 2.1, which accounts for all reaction bills reported on by one or more committees. The data in Table 2.1 is subdivided by Congress and by legislative session within each particular Congress. Overall, there is a high level of consistency and regularity in the number of reaction bills produced each Congress. From the 101<sup>st</sup> through the 110<sup>th</sup> Congresses, the number of reaction bills ranges from a low of 48 to a high of 61 bills.<sup>19</sup> On average during this same

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<sup>19</sup> While these figures represent a true accounting of the number of committee reports attached to particular bills that are produced within each congress, within this initial sweep I deliberately accounted for each individual report even where different committees reported on what were closely similar bills. Many of the committees within each chamber have overlapping jurisdictions, and it is not uncommon for two or more committees in either the House or Senate to consider and report on identical, or nearly identical, bills. Also, many of the distinct committees across

time frame, there are approximately 57 distinct reaction bills reported on by the different committees in Congress.

The remaining results presented in Table 2.1 for the 100<sup>th</sup> Congress back to the 90<sup>th</sup> Congress (1967-1988), while noticeably smaller, demonstrate a similar pattern of behavior as compared to the period from the 101<sup>st</sup> through the 110<sup>th</sup> Congresses. The disparity here in the totals from 1990 forward in comparison to 1989 and back is largely due to the underlying availability of data across these two time spans. Prior to 1990, electronic versions of all committee reports do not exist. Physical paper copies of these reports are available from a variety of sources, but it is not possible to search these using the Atlas.ti software as they need to be in a digital format. Prior to 1989, the only available electronic copies of committee reports are those that are reproduced in U.S.C.C.A.N., and as noted earlier, this database only collects a fraction of all committee reports that involve important pieces of legislation as determined by the editors of that volume. As a result, there are simply less committee reports to search and, in turn, a lower number of reaction bills that can be located between 1967 and 1989. Also, the U.S.C.C.A.N. database only contains reports on bills that became public laws, which for the most part has the practical effect of eliminating any reports on duplicative bills. In effect, only the bill and committee report that progressed all the way to a public law, as well as those public laws that the editors of U.S.C.C.A.N. found to be significant, are included in this database.

Accounting for this discrepancy, however, the frequency of reaction bills per Congress is consistently similar going back to at least 1975, which is the start of the 94<sup>th</sup> Congress. Between 1975 and 1989 there are, on average, 20 bills per Congress, with a low of 16 and a high of 26 across this time span. There is a noticeable drop off in the amount of bills prior to 1975 that goes back to the start of the

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both chambers parallel one another, and in some instances, for example, the judiciary committees in the House and Senate would consider a similar bill at the same time. The fact that this does occur with some regularity is important in its own right, and something I will consider more in depth in chapter 3, but it is a point that needs to be considered when examining the figures in Table 2.1 for the period between the 101<sup>st</sup> and 110<sup>th</sup> Congresses.

database in 1967. While the precise reasons for this important shift in legislative activity beginning in 1975 are beyond the focus of this dissertation, Eskridge, persuasively, attributes much of the increase to a number of institutional and political factors at this time. In the early 1970s, Congress undertook a series of internal reforms that lead to a large increase in the number of committees and the staffs associated with those committees, which staff is of course vital for purposes of monitoring judicial decisions and responding accordingly. Between 1970 and 1975 the number of standing committees doubled, and the staffs supporting all these committees increased by two-thirds (Eskridge 1991). Also, with divided government becoming more of the norm at this time and the Supreme Court shifting from the more liberal Warren Court to having a majority of its members appointed by Republicans by the end of President Ford's term in office, the Democratic majority in Congress became increasingly cognizant of the federal judiciary after 1975. The merits of these different explanations and their causality effects are less important for my own purposes. What is of critical importance is the fact that for the past 35 years (starting around 1975), there has been a generally upward trend in the number of reaction bills produced each Congress that has settled to a point, on average, since 1990 of approximately 55 bills per Congress.

**Table 2.1: Number of Total Reaction Bills by Congress and Session: 1967-2008**

Congress	Year	1st Session	2nd Session	Total # of Bills
110	(2007-2008)	27	28	55
109	(2005-2006)	33	24	57
108	(2003-2004)	34	27	61
107	(2001-2002)	19	29	48
106	(1999-2000)	26	26	52
105	(1997-1998)	32	29	61
104	(1995-1996)	27	30	57
103	(1993-1994)	21	36	57
102	(1991-1992)	30	30	60
101	(1989-1990)	8	38	46
100	(1987-1988)	10	15	25
99	(1985-1986)	9	17	26
98	(1983-1984)	7	10	17
97	(1981-1982)	8	10	18
96	(1979-1980)	8	14	22
95	(1977-1978)	5	11	16
94	(1975-1976)	4	15	19
93	(1973-1974)	2	8	10
92	(1971-1972)	3	2	5
91	(1969-1970)	2	6	8
90	(1967-1968)	5	8	13
Total	(1967-2008)	320	413	733
Average Per Congress	(1967-2008)	15.24	19.67	34.90
Average Per Congress	(1990-2008)	27.67	29.70	57.47

**Note:** The total number of bills reacting to one or more federal court cases are broken out above by session of Congress, with the total number of bills per term of Congress presented in the final column.

**Source:** Compilation by author from analysis of the texts of U.S. House and Senate committee reports attached to legislation produced between 1967 and 2008.

Table 2.1 also delineates the number of reaction bills that were produced within each session of Congress.<sup>20</sup> Between the first and second sessions of any particular Congress, there is a higher degree of variability in terms of the number of bills produced in the first legislative session versus the second. Interestingly, the second session of each Congress produces, on average, more reaction bills than the

<sup>20</sup> To determine whether a particular report fell within the 1<sup>st</sup> or 2<sup>nd</sup> legislative session, I relied on the notation on the report itself when it is published by the particular committee.

## Chapter 2: The Significance of Reaction Bills

first. Across the 21 separate Congresses presented in Table 2.1, 15 of them saw a higher number of reaction bills produced during the second session in comparison to the first, only four were the reverse with Congress producing more bills in the first session, and two of the Congresses had an equal number of bills produced during both sessions. Sometimes the gap in activity between sessions of the same Congress can be quite high. For instance, in the 103<sup>rd</sup> there were 36 bills during the second session and only 21 bills during the first session; whereas in the 109<sup>th</sup> there were 33 bills in the first session and 24 in the second session. From this data alone it is not possible to craft a clear causal narrative for this general disparity in activity between sessions of Congress exists. But, a corresponding anecdote offers one potential explanation for the disparity.

The first legislative session immediately follows an election year where a potentially new Congress and new President have been seated in office, and the legislative calendar during this time tends to be dominated with major new legislative efforts of either of the two parties who have come to control these branches. As I will detail later in Chapter 3, reaction bills, generally, tend to involve modifications to existing statutory schemes and they can occupy a policy environment that is politically less partisan. As a result, it would be reasonable to expect a lower number of reaction bills, generally, when Congress is seeking to enact new legislative programs as its recently-elected members, and possibly a new president, seek to give effect to their campaign promises. Further evidence of this point can be drawn from the fact that some of the lowest total number of bills produced within any one session of Congress occurred in years that saw a new president, and one from the opposite party, taking office. Between 1990 and 2008, this occurred twice, in 1993 when President Clinton brought the White House back in control of the Democrats, and in 2001 when President Bush did the same for Republicans. Those two years also saw the absolute lowest number of total reaction bills produced across this same 18 year time span. Likewise, from 1975 through 1989 there were also two times when the control of the presidency switched between the parties, in 1977 and again in 1981, and across this entire time span



only two of the fifteen sessions had a lower number of bills than was the case in these two years. This point on the policy type that reaction bills tend to fit within will be elaborated on later in Chapter 3, but it is an important observation to keep in mind at this point when examining the divergence in activity between sessions.

### Reaction Laws

In an effort to establish a complete picture of reaction bills and their impact on the lawmaking process, it is essential to account for as many bills as can be reasonably located. In developing this more complete picture, we can learn considerably more about how Congress monitors the federal judiciary, what type of cases are selected for a response, and how these individual bills navigate the lawmaking hurdles. But, any singular focus on all of these bills, regardless of their legislative outcome, overlooks one key fact about Congress: “Almost no bills become law” (Stewart 2001; 337). In recent times, only approximately one-tenth of all bills introduced in the House and about one-quarter of the same in the Senate have been passed in their respective chambers (Stewart 2001). Among that subset of bills, even less progress all the way to become new public laws. The reasons for this are varied and complex, but the reality is that there is a substantive difference in the nature of bills that actually become public laws versus those that die somewhere in this legislative minefield. Thus, in Table 2.2, I detail only those reaction bills that became public laws.

The figures here are obviously smaller than those in Table 2.1, but the overall picture is still one of a measurable level of activity in the arena of reaction bills that become law. Table 2.2 is divided into two broader sections with three distinct columns under each section. The first section is a simple tally of the total number of public laws that had provisions within them responding to one or more court cases, broken out by Congress and each session within a particular Congress. From the 90<sup>th</sup> through the 110<sup>th</sup> Congress, there were a total of 322 new public laws that were either exclusively, or at least

## Chapter 2: The Significance of Reaction Bills

partially, designed to overrule, modify, or codify one or more court cases. This amounts to an average of over 15 new public laws per Congress that meet these criteria and a median point in that same range at 16 laws. Over the last 33 years, from the 94<sup>th</sup> Congress to the 110<sup>th</sup>, the average was a bit higher, at approximately 17 new public laws each Congress. The number of reaction public laws per Congress ranged across this time span from a low of 12 to a high of 23.

The second section in Table 2.2 divides the data somewhat differently to account for the legislative reality that multiple bills often end up being consolidated into a larger more comprehensive bill or omnibus pieces of legislation. Within the first set of columns in Table 2.2, multiple bills that are consolidated into one public law are counted as only one public law. This, however, disguises the overall amount of activity and success rate of individual bills that do end up being consolidated into one singular bill that becomes law. As a result, the second set of columns in Table 2.2, labeled “Total Number of Bills Merged into Public Laws (PL)” counts all distinct bills that became public laws. The totals here are predictably higher. Across the entire period of study, there were 379 bills that successfully made it through the legislative process to become public laws, with a mean over 18 bills per Congress and a median figure of precisely 18 bills. Factoring out the abnormally low number of bills during the first four Congresses in this study, the average rises to over 20 bills per Congress from 1975 through 2008. In this same time span, there was a low of 13 bills that became public laws during the 110<sup>th</sup> Congress to a high of 26 bills in the 99<sup>th</sup> Congress.

**Table 2.2: Number of Reaction Laws, as Divided Between Total New Laws and All Bills: 1967-2008**

Congress	Year	Total Number of New Public Laws (PL)			Total Number of Bills Merged Into Public Laws (PL)		
		1st Session	2nd Session	Total	1st Session	2nd Session	Total
110	(2007-2008)	5	7	12	6	7	13
109	(2005-2006)	13	7	20	16	8	24
108	(2003-2004)	13	4	17	14	5	19
107	(2001-2002)	7	9	16	8	10	18
106	(1999-2000)	6	6	12	7	8	15
105	(1997-1998)	10	8	18	14	10	24
104	(1995-1996)	6	12	18	8	16	24
103	(1993-1994)	6	11	17	12	12	24
102	(1991-1992)	7	5	12	10	5	15
101	(1989-1990)	7	16	23	8	17	24
100	(1987-1988)	9	13	22	10	15	25
99	(1985-1986)	7	16	23	9	17	26
98	(1983-1984)	4	9	13	7	10	17
97	(1981-1982)	7	8	15	8	10	18
96	(1979-1980)	8	10	18	8	14	22
95	(1977-1978)	5	11	16	5	11	16
94	(1975-1976)	4	12	16	4	15	19
93	(1973-1974)	2	7	9	2	8	10
92	(1971-1972)	3	2	5	3	2	5
91	(1969-1970)	1	6	7	2	6	8
90	(1967-1968)	5	8	13	5	8	13
Total	(1967-2008)	135	187	322	166	214	379

**Note:** Only reaction bills that successfully became new public laws are included in this table. The data is divided into two main categories to account for the legislative reality that bills (including reaction bills) originating in different committees or in separate chambers are often merged into one final bill that advances to final passage. In detailing only the number of new reaction laws it would underreport the breadth of this type of legislative activity and the frequency by which distinct bills reacting to court cases successfully become new laws.

**Source:** Compilation by author from analysis of the texts of U.S. House and Senate committee reports attached to legislation produced between 1967 and 2008.

### Legislative Significance

On their own, these figures present an overall accounting of reaction bills in which they can be understood as occurring with regularity, both within any given Congress and across multiple Congresses. They also document the fact that the frequency of such bills is at an interval where it is reasonable to conclude that they represent an important component to the legislative activity of Congress (particularly as it relates to their interactions with the courts). But, looking at these bills in isolation only tells part of the story, as it is important to understand where reaction bills fit within the total scheme of legislative activity. When measured against Congress' total output, does the percentage of bills classified as "reactionary" represent a measurable amount of activity in Congress? Table 2.3 is a starting point for

answering this question, as it contains information on the amount and percentage of reaction bills that become public law when measured against all the public laws produced by any given Congress.<sup>21</sup> For the entire period of the study (1967-2008), the number of reaction public laws as a percentage of all public laws averaged around 3%, with a slightly higher average of 3.28% between 1975 and 2008, which factors out the abnormally low number of reaction public laws prior to 1975. From 1975 through 2008, no one Congress saw reaction public laws as a percentage of all public laws fall below the 2% level, and during the 104<sup>th</sup> Congress there was a high of 5.41%. When measured against the total sum of legislative activity, these numbers are not exceptionally high. But, they do confirm the regularity with which reaction bills are produced, as the percentage of these types of bills relevant to all public laws remains relatively constant in spite of the large fluctuations in how many new public laws are produced during each session of Congress.

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<sup>21</sup> Data on the number of public laws produced during each term of Congress was collected from the *Policy Agendas Project* housed at the University of Texas at Austin. The dataset containing this information can be found at the following web address: <http://www.policyagendas.org/page/datasets-codebooks>

**Table 2.3: Total Number of New Public Laws: 1967-2008**

Term	Year	Total Public Laws	Total Reaction Laws	Reactions Laws as a Percentage of All Laws
110th	2007-2008	460	12	2.61%
109th	2005-2006	482	20	4.15%
108th	2003-2004	498	17	3.41%
107th	2001-2002	377	16	4.24%
106th	1999-2000	580	12	2.07%
105th	1997-1998	394	18	4.57%
104th	1995-1996	333	18	5.41%
103rd	1993-1994	465	17	3.66%
102nd	1991-1992	590	12	2.03%
101st	1989-1990	650	22	3.38%
100th	1987-1988	713	24	3.37%
99th	1985-1986	662	23	3.47%
98th	1983-1984	623	13	2.09%
97th	1981-1982	473	15	3.17%
96th	1979-1980	612	18	2.94%
95th	1977-1978	631	16	2.54%
94th	1975-1976	588	16	2.72%
93rd	1973-1974	647	9	1.39%
92nd	1971-1972	606	5	0.83%
91st	1969-1970	693	7	1.01%
90th	1967-1968	638	13	2.04%
Total	1967-2008	11715	323	
Average	1967-2008	557.86	15.38	2.91%
Average	1975-2008	537.12	17.00	3.28%

Note: Data in the final two columns is derived from the total number of reaction laws per term of Congress as detailed in Table 2.2.

Source: Data on number of public laws for each session of Congress was collected from the *Policy Agendas Project* housed at the University of Texas at Austin. The dataset containing this information is publically available and can be found at the following web address: <http://www.policyagendas.org/page/datasets-codebooks>

Examining the number of reaction public laws as a percentage of all public laws per Congress is a logical starting point in the analysis, but it cannot be the ending point. As noted by Cameron (2000), much of the legislative output by any given Congress concerns matters that have little value or importance to the public-at-large. For example, during the first session of the 110<sup>th</sup> Congress (2007), there were 180 new public laws created. Of these 180 new laws, 74 of them, approximately 41%, dealt with the naming or renaming of various public lands and facilities, such as parks, post offices, federal

courthouses, and veterans' hospitals. While naming rights of federal lands and facilities are important to local communities and some of the residents therein, it is fair to conclude that such legislation has only marginal significance on the national landscape. Many of the other new public laws, similarly, deal with routine administrative matters, such as Public Law 110-39, which was designed: "To authorize the transfer of certain funds from the Senate Gift Shop Revolving Fund to the Senate Employee Child Care Center," or Public Law 110-3, titled: "To provide a new effective date for the applicability of certain provisions of law to Public Law 105-331."

These examples are not atypical, as randomly selecting any session of Congress will produce similar results. The point in presenting these figures and examples is not to diminish the importance and volume of legislation that Congress regularly produces. Congress is a representative body of the people, and it should give effect to the interests and desires of the citizens it represents regardless of the broader impact of those individual desires and goals. Like any organization, it also has routine administrative matters that, while of little interest to most, must be addressed. The central point here, instead, is that much of the more meaningful and important legislation that Congress regularly produces is concentrated in a relatively few new public laws. This critical fact would be overlooked if one were to focus solely on the absolute number of new public laws per Congress. Thus, it is important to examine, once all the public laws of lesser significance are subtracted out, how reaction public laws compare to the total amount of important new laws that emerge from any given Congress. To measure this relationship, I turn to the work of several prominent congressional scholars who have developed techniques for identifying what can be labeled as "significant legislation."

**Table 2.4: Percentage of Type of Public Laws by Significance Category (A-D): 1967-1994**

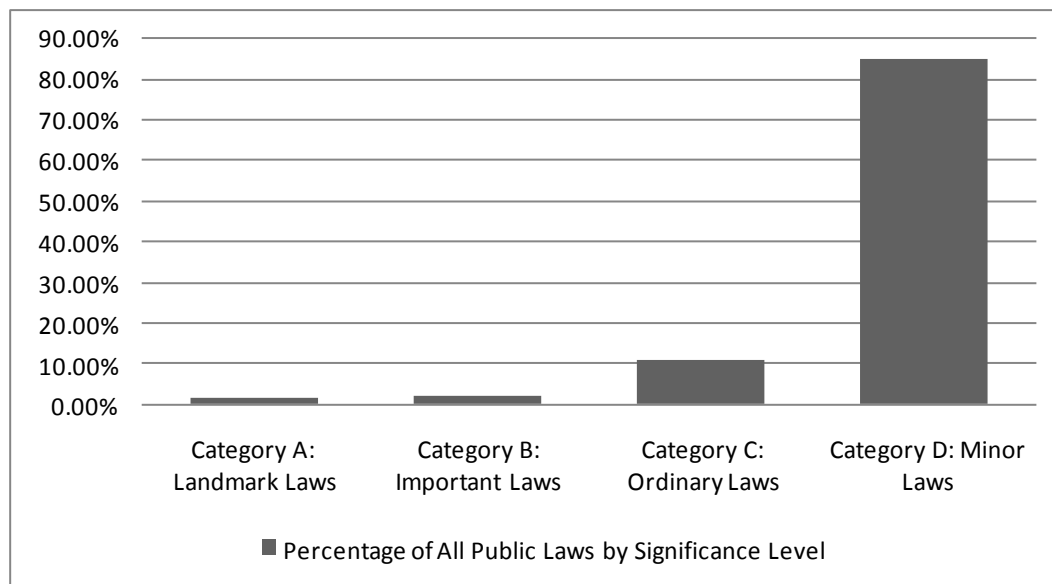
Term	Year	Category A: Landmark Laws	Category B: Important Laws	Category C: Ordinary Laws	Category D: Minor Laws
103rd	1993-1994	2.15%	1.94%	9.25%	86.67%
102nd	1991-1992	1.02%	2.71%	8.64%	87.63%
101st	1989-1990	1.23%	2.46%	8.62%	87.69%
100th	1987-1988	1.54%	1.68%	7.43%	89.34%
99th	1985-1986	1.36%	0.90%	10.84%	86.90%
98th	1983-1984	0.80%	0.80%	13.32%	85.07%
97th	1981-1982	1.27%	2.33%	10.99%	85.41%
96th	1979-1980	1.63%	1.31%	11.26%	85.81%
95th	1977-1978	2.05%	2.84%	7.74%	87.36%
94th	1975-1976	1.36%	3.74%	10.37%	84.52%
93rd	1973-1974	2.00%	2.31%	20.49%	75.19%
92nd	1971-1972	1.97%	2.46%	10.18%	85.39%
91st	1969-1970	1.87%	3.02%	12.09%	83.02%
90th	1967-1968	2.19%	3.28%	15.00%	79.53%
Average Per Congress	1967-1994	1.60%	2.27%	11.16%	84.97%

Source: The data presented in this table was originally collected by Charles Cameron of Princeton University. The underlying data is now publicly available on Professor Cameron's website, which can be located at the following address: <http://www.princeton.edu/~ccameron/datareadme.html>

Relying on data collected and developed by Cameron (2000), who adopts a technique for identifying significant legislation originally pioneered by Mayhew (1991), Table 2.4 classifies all new public laws from 1967 through 1994 (organized by term of Congress) into one of four categories based on their legislative significance.<sup>22</sup> Category D, what Cameron labels as “minor” bills, not surprisingly, is

<sup>22</sup> David Mayhew's pioneering approach to scoring legislative significance, as adopted and modified by Cameron is as follows. There are two measures for scoring significance. “Sweep One” relies on an annual roundup of stories in *The New York Times* and *Washington Post* that discuss the most important legislative accomplishments in any one session based on the opinions of the editors and correspondents with those respective papers. Cameron extended this analysis to include the annual roundup section in the *CQ Almanac* as well as an examination of all bills mentioned in the newspaper roundups, which was supplemented by any discussion of those bills in the body of the *CQ Almanac* as well. This analysis provides a contemporary measure for determining significance. “Sweep Two” is a more historical evaluation that brings together various policy histories from academic experts to identify significant legislation.

the most dominant category of new laws. During this time period, an astounding 85% of all new public laws are labeled as minor. The other three categories, collectively, represent what can be characterized as “significant” new public laws, and they are categorized as follows: (1) group C, making up “ordinary” legislation; group B, making up “important” legislation; and group A, constituting “landmark” laws. Public laws within groups A and B only represent 2%, respectively, of all the new public laws during this time frame, with the remaining 11% of public laws classified under group C.<sup>23</sup> In Figure 2.1, the aggregate percentage of all new public laws between 1967 and 1994, broken out by each of the four categories of significance, is represented graphically. In this figure, the dominant position occupied by “minor” laws produced by each Congress is readily apparent.



**Figure 2.1: Public Law (All) Distribution by Significance: 1967-1994**

**Note:** Data for this figure is derived from Table 2.4

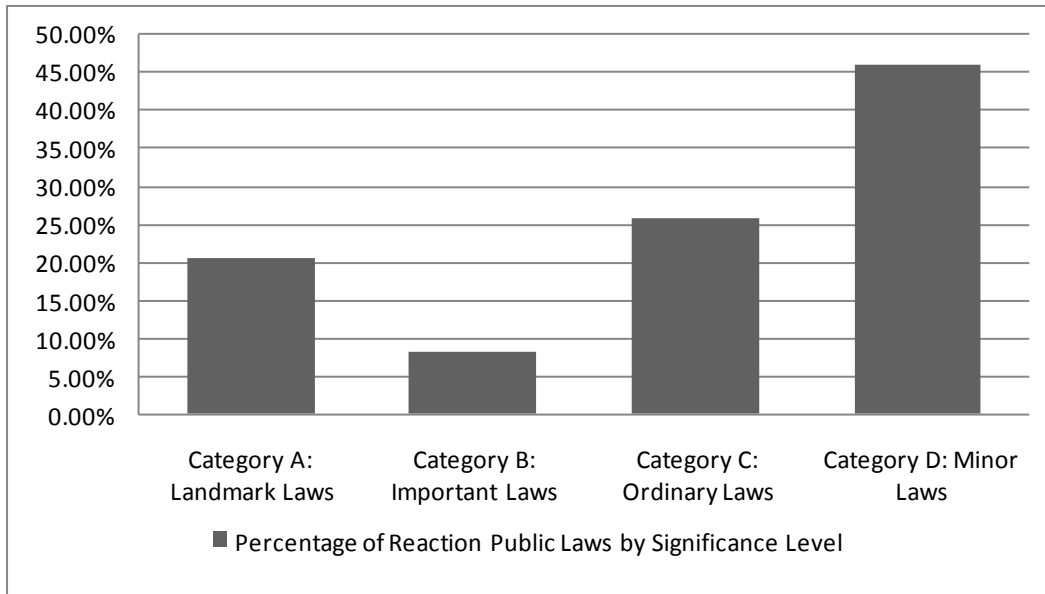
For each session of Congress, Cameron identifies, by public law, which of the four categories they fall within. By merging that data with my own, I was able to classify each of the reaction public

<sup>23</sup> The underlying data for this analysis is available publicly on Dr. Charles Cameron’s website, which can be located at the following address: <http://www.princeton.edu/~ccameron/datareadme.html>



laws identified in my own analysis as being classified within one of the four categories established by Cameron. Between 1967 and 1994, 209 new “reaction” public laws were located. Figure 2.2 is a graphic representation of how these 209 reaction public laws are broken out according to the four categories of legislative significance. As was the case with all public laws during this period of time, the single largest category in this figure is group D, with 46% of reaction public laws falling into this category of “minor” legislation. Nevertheless, the remainder of the picture represented in this figure is quite different than the one presented in Figure 2.1. The majority of reaction public laws, at slightly over 54%, are “significant” pieces of legislation as they fall within groups A through C. Group C is the largest of these three categories, with just under 26%, but it is notable that around 21% of all the new reaction public laws during this time are considered “landmark” pieces of legislation. What is remarkable here is that the majority of “significant” public laws, and two out of 10 “landmark” laws, during this 17-year period had at least elements within them, if not the majority of the new law, that were responsive to one or more federal court cases. Thus, by subtracting out of the analysis “minor” legislation and focusing only on the more significant new laws produced by Congress, it is readily apparent that the category of new public laws classified as “reactionary” represents a significant and measurable component of the more important legislative outputs by Congress.

## Chapter 2: The Significance of Reaction Bills



**Figure 2.2: Public Law (Reaction) Distribution by Significance: 1967-1994**

**Note:** This figure categorizes all reaction public laws based on one of the four general categories of public laws developed by Charles Cameron.

**Source:** Compilation of author based on matches of public law numbers between reaction public laws and all public laws as divided into one of four categories by Charles Cameron for the period of 1967-1994.

Table 2.5 presents a similar picture from a slightly different vantage point. The first two substantive columns in this table detail both the number of reaction public laws and the total number of “significant” public laws (categories A through C) during each term of Congress, from the 90<sup>th</sup> through the 103<sup>rd</sup>. As noted earlier, there were 209 new reaction public laws during this time for an average of over 14 per term of Congress. Likewise, there were 1,295 “significant” public laws during this same time frame, making for an average of approximately 93 significant public laws each term. The third substantive column then details, by term of Congress, how many reaction public laws were passed that also qualify as “significant” public laws. Of the 209 total reaction public laws, 114 of them were also “significant” for an average of over 8 public laws per term of Congress that can be classified as both “reactionary” and “significant.” The final two columns summarize these amounts on a percentage basis. In Figure 2.2, it was shown that over 54% of all reaction public laws can also be classified as “significant,”

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and the second to last column in Table 2.5 breaks out this aggregate number by term of Congress.

There is a considerable amount of variability here, with a low of 25% during the 102<sup>nd</sup> Congress and a high of over 81% during the 95<sup>th</sup>, but the vast majority of the time the number of reaction public laws as a percentage of all significant public laws ranged between 50%-75%.

The final column in Table 2.5 examines what percentage of all significant public laws, per term of Congress and in the aggregate, can also be classified as reaction laws. Between 1967 and 1994, an average of nearly 10% of all “significant” public laws passed during this time period also qualified as “reaction” laws. When the time period prior to the 94<sup>th</sup> Congress is factored out of the analysis, due to the abnormally low number of reaction laws during this earlier time, the average rises to around 12%. In essence, one out of every ten significant new public laws to emerge from any given Congress have elements within them, in whole or in part, that are responsive to one or more federal court cases. I maintain that, in comparison to the data presented in Table 2.3 that detailed the number of reaction bills as a percentage of all new public laws, the information presented in the final column of Table 2.5 represents a more accurate portrait of the importance of reaction bills in the lawmaking and legislative arena. This is due to the fact that all the minor new public laws have been factored out of the analysis, with an appropriate focus on only those new public laws that are more meaningful and have a broader impact on the public.

**Table 2.5: Number of “Significant” Reaction Public Laws by Congress: 1967-1994**

Term	Year	Total Reaction Public Laws (PLs)	Total Significant Laws	Significant/Reaction Matches (Total)	Percentage of all Reaction PLs that are Significant	Percentage of all Significant PLs that are Reaction PLs
103rd	1993-1994	17	62	10	58.82%	16.13%
102nd	1991-1992	12	73	3	25.00%	4.11%
101st	1989-1990	23	80	13	56.52%	16.25%
100th	1987-1988	22	76	9	40.91%	11.84%
99th	1985-1986	23	87	15	65.22%	17.24%
98th	1983-1984	13	93	9	69.23%	9.68%
97th	1981-1982	15	69	10	66.67%	14.49%
96th	1979-1980	18	87	5	27.78%	5.75%
95th	1977-1978	16	80	13	81.25%	16.25%
94th	1975-1976	16	91	7	43.75%	7.69%
93rd	1973-1974	9	161	7	77.78%	4.35%
92nd	1971-1972	5	87	3	60.00%	3.45%
91st	1969-1970	7	118	5	71.43%	4.24%
90th	1967-1968	13	131	5	38.46%	3.82%
Total	1967-1994	209	1295	114		
Total	1975-1994	175	798	94		
Average Per Congress	1967-1994	14.93	92.50	8.14	55.92%	9.66%
Average Per Congress	1975-1994	17.5	79.8	9.4	53.51%	11.94%

Source: Information presented in this table on the “significance” of laws was originally collected by Charles Cameron of Princeton University. The underlying data is now publically available on Professor Cameron’s website, which can be located at the following address: <http://www.princeton.edu/~ccameron/datareadme.html>. Reaction public law data was compiled by author based on research of committee reports in the U.S. House and Senate.

The conclusion that reaction public laws account for a sizeable percentage of significant legislation is not contingent upon the coding decisions by Cameron (2000) for scoring legislative significance, as other measures that seek to capture the same concept produce similar results. An alternative measure commonly used by scholars seeking to evaluate significant legislation is one developed by Baumgartner and Jones (2002) as part of the *Policy Agendas Project*. Relying on their own independent analysis of all public laws back to 1948, with the current data set running through the 105<sup>th</sup>

Congress (1998), Baumgartner and Jones list what they refer to as “important” laws for each session and term of Congress based on their review of the *Congressional Quarterly Almanac* and the number of columns within that publication devoted to each particular public law.<sup>24</sup> Like Cameron, Baumgartner and Jones evaluate each public law passed during this time frame, and if the coverage in the *CQ Almanac* reaches a particular threshold they code that particular public law as being “important.” As expected, there is a considerable degree of overlap between the two lists, but the total number of “important” laws, as identified by Baumgartner and Jones, is measurably smaller than Cameron’s “significant” laws (defined as groups A-C). For instance, Cameron identified 1,295 “significant” laws between 1967 through 1994; whereas across this same time span Baumgartner and Jones identified about 30% as many, or 376 “important” laws. When Cameron’s group C, which accounts for “ordinary” legislation, is factored out, there are 333 laws within Cameron’s groups A and B, roughly on par with the 376 important laws identified by Baumgartner and Jones.

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<sup>24</sup> Data on the number of “important” public laws (80<sup>th</sup> through 105<sup>th</sup> Congresses) produced during each term of Congress was collected from the *Policy Agendas Project* housed at the University of Texas at Austin. The dataset containing this information can be found at the following web address: [http://www.policyagendas.org/page/datasets-codebooks#most\\_important\\_laws](http://www.policyagendas.org/page/datasets-codebooks#most_important_laws)

**Table 2.6: Number of “Important” Reaction Public Laws by Congress: 1967-1998**

Term	Year	Total Public Laws (PLs) (Reaction)	Total Important Laws	Total Important/Reaction PL Matches	Percentage of all Reaction PLs that are Important	Percentage of all Important PLs that are Reaction PLs
105th	1997-1998	18	23	7	38.89%	30.43%
104th	1995-1996	18	17	4	22.22%	23.53%
103rd	1993-1994	17	24	3	17.65%	12.50%
102nd	1991-1992	12	28	4	33.33%	14.29%
101st	1989-1990	23	30	8	34.78%	26.67%
100th	1987-1988	22	17	7	31.82%	41.18%
99th	1985-1986	23	15	5	21.74%	33.33%
98th	1983-1984	13	16	3	23.08%	18.75%
97th	1981-1982	15	16	5	33.33%	31.25%
96th	1979-1980	18	21	4	22.22%	19.05%
95th	1977-1978	16	40	5	31.25%	12.50%
94th	1975-1976	16	41	4	25.00%	9.76%
93rd	1973-1974	9	29	1	11.11%	3.45%
92nd	1971-1972	5	28	1	20.00%	3.57%
91st	1969-1970	7	38	2	28.57%	5.26%
90th	1967-1968	13	33	3	23.08%	9.09%
Total	1967-1998	245	416	66		
	1975-1998	211	288	59		
Average Per Congress	1967-1998	15.31	26.00	4.13	26.13%	18.41%
Average Per Congress	1975-1998	17.58	24.00	4.92	27.94%	22.77%

Source: Data on the number of “important” public laws (90th through 105<sup>th</sup> Congresses) produced during each term of Congress was collected from the *Policy Agendas Project* housed at the University of Texas at Austin. The dataset containing this information can be found at the following web address: [http://www.policyagendas.org/page/datasets-codebooks#most\\_important\\_laws](http://www.policyagendas.org/page/datasets-codebooks#most_important_laws). Reaction public law data was compiled by author based on research of committee reports in the U.S. House and Senate.

Table 2.6 lists the results of the analysis matching reaction public laws with those public laws found to be “important” by Baumgartner and Jones, and the results here show an even stronger correlation between these two types of laws. From the 90<sup>th</sup> through the 105<sup>th</sup> Congress (1967-1998),

## Chapter 2: The Significance of Reaction Bills

245 reaction public laws were identified, and Baumgartner and Jones list 416 “important” laws across that same period. In combining these two lists, 66 reaction public laws can also be classified as “important” laws, averaging just over four public laws per Congress. Given the measurably lower number of “important” laws in comparison to Cameron’s “significant” laws, the number of reaction laws that are also “important” laws is predictably smaller. As a result, the number of total reaction public laws as a percentage of “important” laws stands at 26% during the period of 1967 through 1998, in relation to the comparable number with the Cameron data set, which stood at around 54%. The relationship, however, between the percentage of “important” laws that are also reactionary is even stronger than was the case with Cameron’s “significant” legislation. 18.4% of the “important” laws, as classified by Baumgartner and Jones, between the 90<sup>th</sup> and 105<sup>th</sup> Congresses were also reaction laws. This amounts to nearly two out of every ten important pieces of legislation to emerge from Congress and be signed into law by the President.

Several important points emerge from this analysis leading to the conclusion that reaction public laws represent an important component of legislative activity and deserve serious attention. First, the overwhelming majority of reaction public laws can be classified as either “significant” or “important” under the combined coding schemes developed by Cameron (2000) and Baumgartner and Jones (2004, 2002) for scoring legislative significance. Primarily, this indicates that reaction public laws tend to occupy a space of legislative activity that involves laws of greater import to the public. Second, when examining new laws that can be coded as “significant” or “important,” a large segment of these laws have reactionary elements to them that are responsive to one or more federal court cases. Certainly these important new laws are designed to accomplish numerous tasks, but 10% of these laws under Cameron’s coding system and around 20% under the similar system developed by Baumgartner and Jones are reaction laws as well, making this an important category of the significant/important legislation produced by Congress. In measuring the impact of reaction public laws on the legislative

process, while it is logical to begin such an analysis by comparing the number of reaction laws with the total legislative output by Congress, that cannot be the end point in the analysis. Much of what Congress does, as measured by how many public laws are produced each term, is of little consequence to the mass public or the operations of the government at large. As such, it is critical to focus any analysis of congressional activity on the more significant laws that it produces. When this is done, the true and meaningful impact of reaction bills clearly emerges.

### Federal Court Cases

A separate, but equally persuasive, measure for understanding the importance of reaction bills is to examine how many federal court cases were the subject of these bills across this same time period. In this section, it will be established, particularly on the level of the Supreme Court, that the number of decisions issued by the courts each year that are subject to a congressional response is relatively high. Additionally, the fact that Congress does regularly move to react to cases is taken notice of by the justices and judges on the federal bench, which will be documented. The extent to which the behavior of the federal justices and judges is influenced by the knowledge that Congress may work to override or otherwise react to their decisions is beyond the scope of this analysis. But, the fact that a measurable amount of cases are regularly responded to by Congress, and that the members of the federal courts know this, has important implications for understanding how these branches interact with one another and the overall significance of the reaction bills and laws on the broader lawmaking process.

In Table 2.7, the number of federal court cases reacted to within all the bills produced by Congress between 1967 and 2008 for which committee reports were electronically available, regardless of whether the bill became law or not, is displayed. In total during this time, there were 1,408 federal



cases that were subject to distinct reaction bills in Congress.<sup>25</sup> The unit of analysis in Table 2.7 is each term of Congress and the cases are subdivided by the level of the court in which the case appeared. Thus, each case is categorized according to whether it was decided by the: (1) Supreme Court; (2) Court of Appeals; (3) District Court; (4) Article I court (such as the U.S. Tax Court); or (5) State court. The largest single category of cases that were subject to one or more reaction bills is drawn from decisions by the various Courts of Appeals across the United States. In total, there were 658 cases decided by the Courts of Appeals that were responded to by Congress. This is not surprising given that, aside from decisions by the Supreme Court, Court of Appeals cases generally garner the most amount of attention and each year these courts collectively produce tens of thousands of decisions. In combination with the U.S. District Court decisions, the lower courts in the federal judiciary generated 844 cases during this period that subsequently resulted in a reaction bill in Congress. The second largest category of cases that Congress reacted to is decisions by the Supreme Court. 437 Supreme Court cases received a legislative response. Finally, on the federal court level, 124 decisions by various Article I courts, such as the United States Tax Court or the United States Patent Court, were also the targets of congressional responses.

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<sup>25</sup> The figures in Table 2.6 are drawn from all the reaction bills in Congress between 1967 and 2008. The actual number of distinct cases responded to during this time is smaller than the number presented above. This is due to the fact that one or more cases may have been the subject of more than just one reaction bill during this time. I eliminated duplicate cases within any one given term of Congress where two or more bills responded to the same case. For instance, within the 109<sup>th</sup> Congress (2005-2006), I only counted a case once even if it was the subject of multiple reaction bills. However, I considered each term of Congress (i.e. the 110<sup>th</sup> Congress (2007-2008)) as a new and distinct attempt to react to any given court case. Thus, a case like *United States v. Eichman* (1990) was only counted once within each term of Congress, but bills seeking to override this case appeared in several distinct congresses, resulting in the same case being counted more than one time.

**Table 2.7: Total Number of Federal and State Court Cases Responded to in Reaction Bills: 1967-2008**

Congress	Year	Supreme Court	Courts of Appeals	District Courts	Lower Federal Courts (Combined)	Article I Courts	State Courts	Total
110	(2007-2008)	37	80	32	112	9	0	158
109	(2005-2006)	34	58	10	68	11	0	113
108	(2003-2004)	18	62	10	72	7	0	97
107	(2001-2002)	25	45	8	53	5	0	83
106	(1999-2000)	21	25	10	35	8	0	64
105	(1997-1998)	28	27	14	41	3	0	72
104	(1995-1996)	32	36	8	44	8	2	86
103	(1993-1994)	37	54	14	68	23	1	129
102	(1991-1992)	53	57	9	66	5	0	124
101	(1989-1990)	36	24	18	42	0	0	78
100	(1987-1988)	5	20	9	29	7	0	41
99	(1985-1986)	14	49	6	55	4	0	73
98	(1983-1984)	15	29	3	32	6	0	53
97	(1981-1982)	8	11	5	16	0	0	24
96	(1979-1980)	12	16	6	22	14	0	48
95	(1977-1978)	27	26	11	37	2	0	66
94	(1975-1976)	15	14	9	23	2	0	40
93	(1973-1974)	6	5	2	7	1	0	14
92	(1971-1972)	6	1	0	1	0	0	7
91	(1969-1970)	2	10	2	12	4	0	18
90	(1967-1968)	6	9	0	9	5	0	20
Total	(1967-2008)	437	658	186	844	124	3	1408
Average Per Congress	(1967-2008)	20.81	31.33	8.86	40.19	5.90	0.14	67.05
Average Per Congress	(1991-2008)	31.67	49.33	12.78	62.11	8.78	0.33	102.89

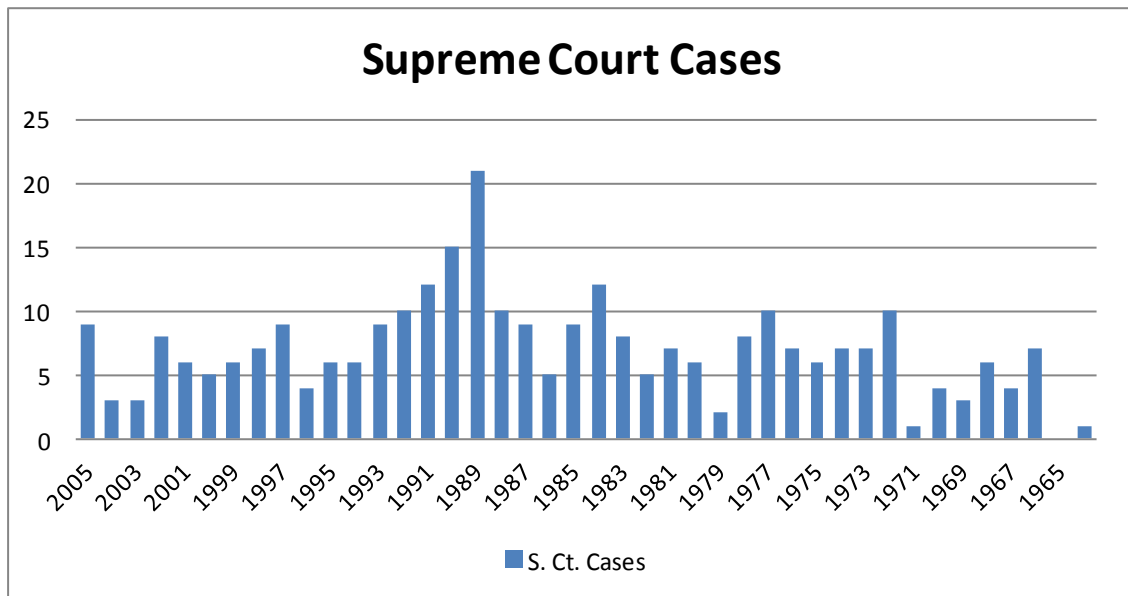
**Source:** Compilation by author from analysis of the texts of U.S. House and Senate committee reports attached to legislation produced between 1967 and 2008.

A more precise and telling way to examine the impact of reaction bills on federal court cases is to look at the number of cases, each year, that are subject to a reaction bill, in total, and as a percentage of all cases decided by a particular court. Since I am most interested in studying the relationship

between Congress and the Supreme Court, the analysis here focuses on the number of Supreme Court cases that are responded to in congressional reaction bills. Figure 2.3 graphs the number of Supreme Court decisions that were subject to a reaction bill between the years 1964 and 2005.<sup>26</sup> The number of cases in Figure 2.3 includes all decisions by the Supreme Court that were subject to a reaction bill, regardless of whether the bill itself was successfully passed by Congress and signed into law by the President as a new public law. Each case is assigned to a particular year based on when the case was decided by the Court. During this entire period, 296 distinct Supreme Court decisions were subject to a reaction bill in Congress. On average, 6.88 cases per year received a congressional response, but the number of responses from any one year varied considerably. In 1989, for example, 21 different cases were reacted to by Congress, whereas in 1965 there were none. It is also important to keep in mind, however, that there is no statute of limitations on congressional responses. In other words, future Congresses can, and likely will, respond to additional cases that have been previously decided, resulting in a constant elevation of these numbers. Thus, these numbers only represent a snapshot of the situation as of 2008.

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<sup>26</sup> The year interval here does not overlap that of the main body of data, which begins in 1967 and continues through 2008. This is due to the fact that, generally speaking, there is a lag period between the issuance of a particular decision and the time frame for which a legislative response is likely to occur. As will be discussed in greater detail in Chapter 3, while many court decisions are reacted to quite quickly, within one or two years, the overall majority of cases do not receive an initial legislative response until 3 years or later from the time they were issued. Thus, for example, there are relatively few Supreme Court decisions from 2007 or 2008, which is due in large part to the fact that there has been only one or two terms of Congress since the time those decisions were issued to generate a response. Over time, the number of decisions that generate a legislative response, to a certain point, is likely to increase as Congress has additional opportunities to generate a reaction bill. Thus, I begin the analysis here in 2005 and go back to 1964 (which represents a three-year shift from the main database on reaction bills).



**Figure 2.3: Total Number of Supreme Court Cases Reacted to in Legislation by Congress, by Year: 1964-2005**

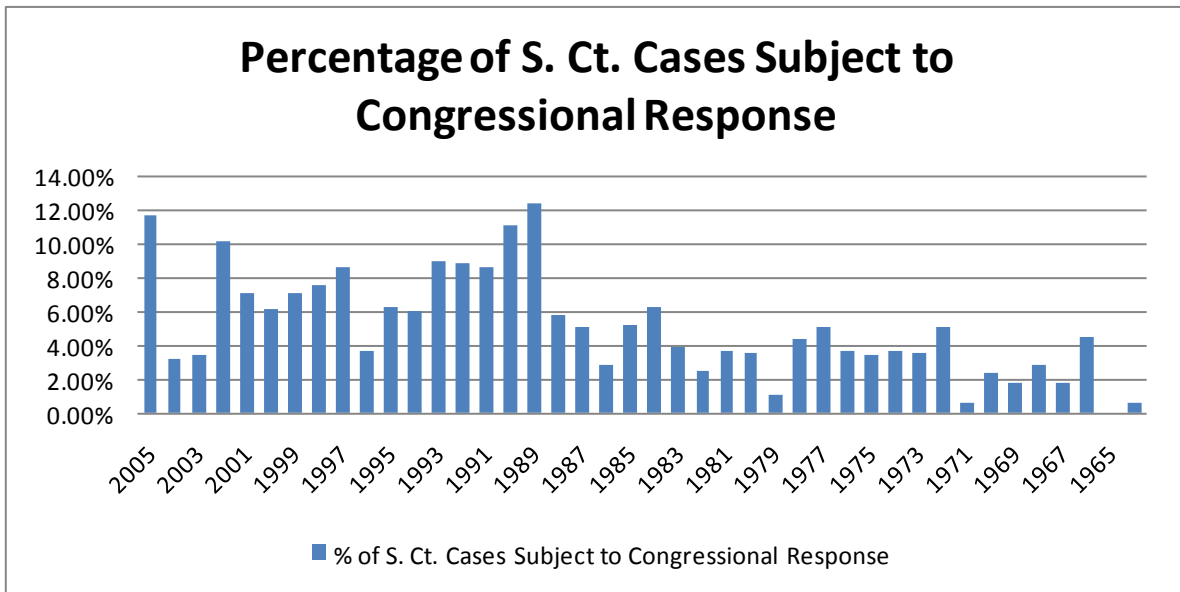
Source: Compilation by author from analysis of the texts of U.S. House and Senate committee reports attached to legislation produced between 1967 and 2008. Year of case was determined from a review of the U.S. Supreme Court Reporter.

In Figure 2.4, the same underlying data is presented in a different fashion by comparing the number of Supreme Court cases that were subject to a congressional reaction bill as a percentage of all Supreme Court cases decided in any given year. In presenting this information, however, I had to overcome an initial obstacle generated from the fact that data on the Supreme Court is generally organized based on the particular Term of the Court that begins in October of one year and comes to a close in June of the following year. Since the data on Supreme Court cases that have been reacted to by Congress is organized according to the year the case was decided, there would not be a one-to-one match with the number of cases decided by the Court each Term. Fortunately, Baumgartner and Jones (2002) as part of the *Policy Agendas Project*, have recoded Supreme Court cases to match the regular January 1<sup>st</sup> through December 31<sup>st</sup> calendar year. Relying, in part, on that data, it became possible to measure the total percentage of Supreme Court cases each year that were also part of a congressional

## Chapter 2: The Significance of Reaction Bills

reaction bill. Between 1964 and 2005, on average in any given year, approximately 5% of all cases decided by the Supreme Court generated a legislative response.

In more recent years, however, the percentage of cases is generally quite a bit higher than from what is presented by this broader snapshot. This is due to two independent events. First, the number of cases heard by the Supreme Court each year has been on a steady downward trajectory. For much of the 1960s and 1970s, the Court regularly heard and decided around 200 cases per year. But, beginning in the early 1990s this number began to drop considerably. Between 2002 and 2005 for example, the Court only formally decided 79, 88, 94, and 77 cases for each respective year. Second, as discussed earlier, the number of reaction bills up until the early 1970s was relatively small in comparison to the past 35 years or so. The combination of these two factors thus drove down the average for the early years of this analysis. Thus, looking at just the last twenty years of data, from 1985 through 2005, in comparison, the percentage of cases that were reacted to in Congress is measurably higher. During this period, an average of over eight cases per year received a response, which translates to over 7% of the Court's formally decided written opinions. While each year has at least a few cases that were reacted to by Congress, in several of the individual years, such as 1989 or 2005, the percentage of cases was above 10%. Over time, as additional Congresses come into session, these numbers will only increase. But, even as the situation now stands, two conclusions clearly emerge: (1) that Congress regularly responds to Supreme Court decisions each year and; (2) that the number of cases responded to represents a significant percentage of the total number of cases decided by the Supreme Court each year.



**Figure 2.4: Percentage of All Supreme Court Cases Subject to Congressional Legislative Response, by Year: 1964-2005**

Source: Compilation by author from analysis of the texts of U.S. House and Senate committee reports attached to legislation produced between 1967 and 2008. Data on number of Supreme Court cases each year was gathered by Baumgartner and Jones (2002) as part of the *Policy Agendas Project*. Year of case was determined from a review of the U.S. Supreme Court Reporter.

#### Interbranch Monitoring:

The information detailed in this chapter up to this point has presented three distinct foundational points to support the broader conclusion that reaction bills represent a significant component of Congress' overall legislative activity as well as a source of regular interaction between Congress and the federal courts as part of the broader lawmaking process. To summarize, those three points are as follows: (1) Congress regularly produces a measurable number of reaction bills during each legislative session; (2) those reaction bills represent a sizeable percentage of the total amount of "significant" or "important" legislation produced in each session of Congress; (3) the number of federal courts cases that are reacted to in these various bills averages several dozen per term of Congress, and in regards to Supreme Court cases, represents a sizeable percentage of cases decided by the Court each

year. Given this level of activity, it is reasonable to suspect that members of Congress and the federal judiciary are closely aware of how their own work is interpreted and responded to by their respective branches of government, and, in turn, this cognitive awareness has some impact on the behavior of these actors. But, beyond the sheer quantity of reaction bills themselves and the number of cases they respond to, is there any direct evidence that an awareness of this activity exists among the actors within both Congress and the Supreme Court? The remaining chapters examine this question from a variety of angles, but in the final section of this chapter I examine specific statements from congressional committees and Supreme Court Justices for evidence of this monitoring, and responsiveness to, decisions and input from the coordinate branches.

### Congressional Monitoring

Lawmaking, in a separation-of-powers system, is a fluid and cyclical process whereby the acts of the various branches involved in the development of law result in a “progression of alterations” to an underlying statute (Jones 1995, 5). Thus, it is not uncommon for Congress to regularly revisit areas of the law that have already been subject to legislation and, due to this ongoing progression, demand additional refinements, modifications, or additions to the underlying statute. In bills of this nature, the various committees will often detail the history of Congress’ activity on the particular topic of that bill, including any judicial activity. For instance, consider H.R. 1691 produced during the 106<sup>th</sup> Congress that eventually became Public Law 106-274. This was a bill considered by the Judiciary Committee in the House of Representatives, and as stated at the outset of the final report produced by this committee was designed to “protect religious liberty.”<sup>27</sup> The bill, titled the Religious Liberty Protection Act (“RLPA”), was the final act in a nearly decade long struggle between Congress and the Supreme Court concerning the scope of the Free Exercise Clause in the First Amendment and Congress’s ability to legislate in the arena of religious freedom.

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<sup>27</sup> H. Rep. 106-219, 1.

## Chapter 2: The Significance of Reaction Bills

The conflict began in 1990 when the Supreme Court ruled on the case of *Employment Division, Department of Human Resources of Oregon v. Smith*<sup>28</sup> (hereinafter “*Employment Division*”). The respondents in this matter, Alfred Smith and Galen Black, tested positive for peyote during an employment drug test, and they were subsequently fired from their jobs at a private drug rehabilitation organization. Both were members of a Native American Church and had ingested the peyote as part of a religious ceremony. Subsequent to their termination, they applied to the Oregon Employment Division for unemployment benefits. They were deemed ineligible for those benefits because they had been fired for work-related “misconduct,” which category includes being in possession of a controlled substance without a prescription. The Oregon Supreme Court had determined the denial of benefits was permissible because the respondents had committed a crime under Oregon law, and this determination was appealed to the U.S. Supreme Court on the grounds that this violated the 1<sup>st</sup> Amendment rights of the respondents.<sup>29</sup>

The issue in front of the U.S. Supreme Court largely turned on the application of a particular doctrine the Court uses to analyze state or federal laws that may inhibit an individual’s free exercise of their religion. In cases of this nature, the Supreme Court has adopted a doctrine for scrutinizing whether actions by government actors impinge on the constitutional rights of U.S. citizens. Under this doctrine, the Court applies one of three tests, ranging from most exacting level of review to the least. These tests are generally referred to as “strict scrutiny,” “intermediate scrutiny,” or “rational basis review.” The Court’s application of the different tests to a particular case largely depends on the nature of the right claimed and the group or classification of the individual asserting the claim. Not surprisingly, when the Court applies strict scrutiny to the actions of government officials there is a higher probability of striking down those actions for being in violation of an individual’s constitutional rights. In this matter, the Court ultimately refused to apply a heightened standard of review that requires the

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<sup>28</sup> 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990).

<sup>29</sup> *Id.* at 874-875.



government to prove a “compelling state interest” in order to uphold the validity of a particular law impacting religious freedom. As a result, the Court concluded that the Free Exercise Clause did not prohibit the State of Oregon from denying unemployment benefits to persons fired for violating the State’s drug laws.<sup>30</sup>

In 1993, Congress had taken steps to override *Employment Division* when it enacted the Religious Freedom Restoration Act (“RFRA”), which became Public Law 103-344. While the law itself was technically complex, its basic impact was to require the federal courts to analyze religious free exercise claims under a standard that the courts had previously labeled as “strict scrutiny.”<sup>31</sup> This new law, Congress believed at the time, would make it unlikely for future courts to reach the same conclusion as was the case with *Employment Division*. The RFRA, however, turned out to only represent only the next step in the dispute between Congress and the Supreme Court on this issue. Several years after it was passed, in 1997, the Supreme Court considered a challenge to the constitutional validity of the RFRA in the case of *City of Boerne v. Flores*.<sup>32</sup> In passing the RFRA, Congress had relied on its power under Section 5 of the 14<sup>th</sup> Amendment, which is generally regarded as the prophylactic provision in the 14<sup>th</sup> Amendment giving Congress the power to pass legislation enforcing the substantive rights specified elsewhere in the Amendment. The Supreme Court agreed that Congress does have the power to enact legislation enforcing the constitutional right to the free exercise of religion under Section 5, but this power is only remedial in nature to correct violations of the Free Exercise Clause as interpreted by the Supreme Court. Justice Kennedy, writing for the majority, found that the legislative history of the RFRA lacked adequate evidence to conclude that laws discriminating against free religious exercise existed such that the RFRA could be understood as “responsive to, or designed to prevent, unconstitutional

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<sup>30</sup> *Id.* at 890.

<sup>31</sup> The strict scrutiny standard of review, in comparison to the compelling state interest standard, is widely regarded by legal scholars and practitioners as a more burdensome and difficult burden of proof that government actors must meet in establishing that a particular law does not violate the First Amendment.

<sup>32</sup> 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997).

behavior.”<sup>33</sup> Without such a congressional finding, the Court found Congress had exceeded its Section 5 authority, thus making the law (the RFRA) unconstitutional.

The RLPA, which was passed in 1999, represented an ongoing effort by Congress to override *Employment Division*, but the text of the committee report itself also offers evidence of the fact that members of Congress closely watch how the Supreme Court interprets the laws it passes and adjusts its behavior according to the scope of those responses. In the committee report accompanying the RLPA, the House Judiciary Committee made the following finding:

Mindful of the limitations enunciated by the Court in *Boerne*, H.R. 1691 employs well settled sources of Congressional authority for the protection of religious exercise. After the *Boerne* decision, the power of Congress in the area of religious liberty is limited to the spending power, regulating interstate commerce, and remedying state infringements on due process, equal protection, or the privileges and immunities of citizenship. H.R. 1691 employs all of these remaining avenues of established Congressional authority.<sup>34</sup>

Two important points emerge from this passage in the committee report accompanying H.R. 1691. First, Congress can indeed be persistent. The RLPA represented, at least, the second major statutory effort by Congress to override a decision that at this time was nearly a decade old. Second, Congress was both aware of how the Supreme Court interpreted its earlier efforts to legislate in this area, and, while constrained by those decisions, took guidance from the Court in crafting and justifying its most recent legislative effort. Members of Congress recognized, and conceded, the limitations imposed on them by the Court and found a way to accomplish their underlying goal while working within those constraints.

A separate example comes from H.R. 3244, titled the Victims of Trafficking and Violence Protection Act of 2000. The bill arose, in part, out of a Supreme Court case from over a decade earlier, captioned *United States v. Kozminski*.<sup>35</sup> The case began in 1983 when authorities in Michigan discovered that two mentally handicapped men were being kept and forced to work on a dairy farm operated by the Kozminski family without any pay and in squalid conditions. After being charged with keeping these

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<sup>33</sup> 521 U.S. at 532 (1997).

<sup>34</sup> H.R. 106-219.

<sup>35</sup> 487 U.S. 931, 108 S.Ct. 2751, 101 L.Ed.2d 788 (1988).

two men in a state of “involuntary servitude” in violation of 18 USC §1584, the district court found that while the Kozminskis never physically threatened the two men, they had used psychological techniques on them, each of whom had the intelligence level of an 8 year old despite being in their 60s, to keep them in this state of isolation and poor health. On appeal, however, the Supreme Court upheld a decision by the Seventh Circuit Court of Appeals acquitting the defendants in the case. The Court found that the language of Section 1584 was to be narrowly construed such that involuntary servitude brought about only by actual or threatened violence or legal action would constitute a violation of the statute. Since the psychological techniques used by the defendants to hold the victims were not defined by the statute as instances of “involuntary servitude,” the defendants could not, by definition, be criminally responsible for violating this section of the code.

In writing for the majority, Justice O’Connor noted that the definition of “involuntary servitude” under the statute was limited to situations of actual or threatened violence or legal action against someone and that it was not for the Court to expand the meaning of this term. O’Connor observed that: “Whether other conditions are so intolerable that they, too, should be deemed to be involuntary is a value judgment that we think is best left for Congress.”<sup>36</sup> Thus, she concluded, “[a]bsent change from Congress” the Court was stuck with applying the statute as defined.<sup>37</sup> In the committee report accompanying H.R. 3244, the members of the committee were clearly mindful of the comments made by Justice O’Connor in the opinion. The bill, once it became law, created a new section of the U.S. Code that prohibits slavery, adding to that an expanded definition of “involuntary servitude” to include the very psychological techniques used by the defendants in the *Kozminski* case. In justifying this new section, the committee noted it was created “[i]n order to address issues raised by the decision of the United States Supreme Court in *United States v. Kozminski*, 487 U.S. 931 (1988), the agreement creates a

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<sup>36</sup> 487 U.S. at 951 (1988).

<sup>37</sup> Id. at 952 (1988).

new section 1589,” which “is intended to address the increasingly subtle methods of traffickers who place their victims in modern-day slavery.”<sup>38</sup>

The interchange between the Supreme Court and Congress in the context of this case and the corresponding new public law is notable for several reasons. The case provided a “real-life” context through which Congress could come to understand the deficiencies in the original statute. Most legislators would agree that keeping someone in “slave-like” conditions, regardless of the means by which this is done, is reprehensible and should be criminal behavior. But, the original definition of “involuntary servitude” was too narrow to account for the various means by which someone may be kept in such a condition. The case presented an opportunity for Congress to understand this deficiency and make the appropriate correction. It is also important to note that while the Court was reluctant to make such a policy declaration on its own, it was explicit in deliberately mentioning Congress as the place to remedy the problem and implicit in suggesting Congress may in fact want to take such corrective action. Finally, the committee responsible for drafting the bill makes an explicit reference to the problems with the current statute as detailed by the Supreme Court as at least partial justification for creating this new section in the Code, demonstrating a level of awareness with the actual text of the decision.

These examples are illustrative of the point that members of Congress are aware of the outcome of judicial decisions and can rely on the information provided by those decisions, both from the judges/justices themselves and the underlying facts of the case, to revisit and reformulate an existing statutory scheme. This monitoring can take the form of identifying gaps in existing statutes that may need to be remedied and to salvage previously enacted laws that the Court has deemed invalid. As nicely summarized by Pickerill on this last point, “[m]embers of Congress appear to pay close attention to the Court’s opinions in determining the nature of concessions that are necessary to save

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<sup>38</sup> H.R. 106-939.

legislation....This relationship is often characterized as the establishment of constitutional parameters by the Court while Congress works within those parameters to pursue public policy” (2004, 58). Thus, as these examples suggest, not only are members of Congress monitoring at least some decisions by the Supreme Court, but they are also relying on the information provided in those decisions to close gaps in existing laws or seek some compromise position with the Court over the content of various public policy goals and, in turn, the legislation itself.

### Judicial Monitoring

With evidence of congressional monitoring of, and responsiveness to, decisions by the Court, a similar question must be posed of the judiciary to determine whether members of the federal bench are also aware of this legislative activity that can be seen as responsive to their decisions and, if so, whether this impacts their decision-making behavior. It is not possible to poll or interview federal Justices and judges as to the reason(s) that may have influenced their decision in any given case. Nonetheless, there is anecdotal evidence, based on statements in the decisions themselves, suggesting that members of the Supreme Court in particular regularly look for guidance from Congress in interpreting statutes and are aware of legislative responses to their previous decisions. Below, some of these statements are detailed as additional support for the argument that reaction bills represent an important arena of legislative activity and congressional/judicial relations that justify a reconsideration of the broader lawmaking process.

Since the 1930s and 1940s, the Supreme Court and lower federal courts have publically acknowledged, through their written opinions, that Congress can revisit their decisions, and in some cases it may be prudent for them to take such action. For instance, in the 1943 case of *Helvering v. Griffiths*<sup>39</sup>, Justice Jackson, writing on behalf of the Court, made the following observation:

There is no reason to doubt that this Court may fall into error as may other branches of the Government. Nothing in the history or attitude of this Court should give rise to legislative

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<sup>39</sup> 318 U.S. 371, 63 S.Ct. 636 (1943).

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embarrassment if in the performance of its duty a legislative body feels impelled to enact laws which may require the Court to reexamine its previous judgment or doctrine.<sup>40</sup>

Justice Jackson continued on in this opinion to imply that a legislative response, in light of a judicial error, may be the preferred or necessary response given the obstacles the Court must overcome to “extricate itself from error.”<sup>41</sup> What he meant here was that the Court can only reconsider an earlier decision when a new case or controversy that satisfies all the justiciability requirements<sup>42</sup> is brought before it. Congress is not equally so constrained, as new legislation there can be initiated at almost any time, and this quote by Justice Jackson appears to recognize this fact. The statement by Justice Jackson is also indicative of the fact that for many years now the members of the Court have acknowledged that legislative responses to their decisions may be in order from time-to-time and that the Court should be open to this type of activity.

In fact, not only must the Court be open to these legislative corrections, it is a critical mechanism for correcting judicial errors that does not undermine the Court’s legitimacy. Courts must administer a logically coherent and consistent set of principles and rules, which is central to the legitimacy of the institution. As best articulated by F.A. Hayek (1973, 115) “the order the judge is expected to maintain is thus not a particular state of things but the regularity of a process which rests on some of the expectations of the acting persons.” With that observation, courts, historically, have been reluctant to undue established precedents, even when a line of cases is mistaken, because it can compromise the Court’s legitimacy through the erosion of expectations. Congress, on the other hand, in adopting a new bill that modifies the state of the law, is uniquely positioned to extricate the courts from past errors through a legislative “fix.” In fact, in taking such a route, Congress enhances its own

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<sup>40</sup> 318 U.S. at 400-01.

<sup>41</sup> 318 U.S. at 401.

<sup>42</sup> Such as the requirements for “standing,” “mootness,” and “ripeness” of the case.

legitimacy by engaging in the very behavior it was designed to accomplish, and the Court is not forced to undermine its legitimacy by overturning its earlier decisions.

More recent pronouncements from various justices on the Supreme Court suggest a clear understanding on the part of the judiciary that Congress can override decisions based on statutory law by the Court and that the justices are aware that this happens. Consider, for example, a dissenting opinion by Justice David Souter in the case of *St. Mary's Honor Center, et.al. v. Hicks*<sup>43</sup> where he made the following pronouncement:

Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done.<sup>44</sup> It is not as though Congress is unaware of our decisions concerning Title VII, and recent experience indicates that Congress is ready to act if we adopt interpretations of this statutory scheme it finds to be mistaken. See Civil Rights Act of 1991, 105 Stat. 1071. Congress has taken no action to indicate that we were mistaken in *McDonnell Douglas* and *Burdine*.

From this short passage, several interesting points can be drawn. First, at least in the opinion of Justice Souter, there is an acknowledgment that when it comes to statutory law, Congress, not the Court, has ultimate authority. Second, the justices on the Court are aware of instances in which Congress has exercised such prerogative in the belief that the conclusion of the Court was mistaken. Here, Souter specifically references the Civil Rights Act of 1991 as an enactment responsible for overriding numerous Court decisions on Title VII. Finally, given the foregoing, when Congress does not move to reverse or modify the outcomes in one or more cases, the justices see this as tacit agreement with the Court's decision in any given case. The implication here is that at least certain justices may feel more confident applying a particular interpretation from a past case to a new case when Congress has not initiated any legislative response to the earlier case.

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<sup>43</sup> 509 U.S. 502; 113 S. Ct. 2742; 125 L. Ed. 2d 407 (1993).

<sup>44</sup> *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-173, 105 L. Ed. 2d 132, 109 S. Ct. 2363 (1989).

Picking up on one of the same themes expressed by Souter, Justice Stevens, writing in dissent in the case of *West Virginia University Hospitals, Inc. v. Casey*<sup>45</sup>, listed various cases decided under an array of statutes that distinct Congresses have since repudiated. Stevens notes:

On those occasions, however, when the Court has put on its thick grammarian's spectacles and ignored the available evidence of congressional purpose and the teaching of prior cases construing a statute, the congressional response has been dramatically different. It is no coincidence that the Court's literal reading of Title VII, which led to the conclusion that disparate treatment of pregnant and nonpregnant persons was not discrimination on the basis of sex, see *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), was repudiated by the 95th Congress; that its literal reading of the "continuous physical presence" requirement in § 244(a)(1) of the Immigration and Nationality Act, which led to the view that the statute did not permit even temporary or inadvertent absences from this country, see *INS v. Phinpathya*, 464 U.S. 183 (1984), was rebuffed by the 99th Congress; that its literal reading of the word "program" in Title IX of the Education Amendments of 1972, which led to the Court's gratuitous limit on the scope of the antidiscrimination provisions of Title IX, see *Grove City College v. Bell*, 465 U.S. 555 (1984), was rejected by the 100th Congress; or that its refusal to accept the teaching of earlier decisions in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) (reformulating order of proof and weight of parties' burdens in disparate-impact cases), and *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (limiting scope of 42 U. S. C. § 1981 to the making and enforcement of contracts), was overwhelmingly rejected by the 101st Congress, and its refusal to accept the widely held view of lower courts about the scope of fraud, see *McNally v. United States*, 483 U.S. 350 (1987) (limiting mail fraud to protection of property), was quickly corrected by the 100th Congress.

Here, while presumably chastising the majority in this particular case for applying what he sees as an overly literal reading of the statute at issue in this case and subsequently ignoring what he calls "evidence of congressional purpose," Stevens goes on to list six distinct cases that were subsequently overridden by Congress for committing the same error he now sees the majority engaging in with the case at hand. Stevens' rhetorical motivation is less important here, however, as is the fact that he was aware of numerous cases decided by the Court that had been subsequently overridden, including which specific Congress took the override action. From this knowledge, Stevens believed the majority was wrong in the case-at-hand by applying what he viewed as an overly strict interpretation of a statute, as similar decisions by the Court in the past had subsequently been repudiated by Congress.

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<sup>45</sup> 499 U.S. 83; 111 S. Ct. 1138; 113 L. Ed. 2d 68 (1991).



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As noted earlier, not only do members of the Court monitor when Congress has taken action to override or limit a particular decision, but equally important is that the Justices also take note of a *lack* of response as indicative of congressional approval of their interpretation. For instance, in his majority opinion in the case of *Hilton v. South Carolina Public Railways Commission*<sup>46</sup>, Justice Kennedy applied the doctrine of *stare decisis*, relying on the Court's earlier decision in *Parden v. Terminal Railway of Alabama Docks Dept.*<sup>47</sup> interpreting the Federal Employers' Liability Act ("FELA"). Kennedy justified the Court's continued adherence to the conclusion in this earlier case based on the fact that "Congress has had almost 30 years in which it could have corrected our decision in *Parden* if it disagreed with it, and has not chosen to do so. We should accord weight to this continued acceptance of our earlier holding."<sup>48</sup> A separate opinion by Justice Souter offers additional evidence of this judicial monitoring of congressional responses to the Court's decisions, or the lack thereof. In *Curtis v. United States*<sup>49</sup>, Souter offers the following observation:

[Our] presumption is strongly bolstered by the fact that Congress, despite the consistent interpretation of the ACCA as permitting attacks on prior convictions during sentencing, and despite amending the law several times since its enactment (see note following 18 U.S.C. § 924 (1988 ed. and Supp. V) (listing amendments)), left the language relevant here untouched. Congress's failure to express legislative disagreement with the appellate courts' reading of the ACCA cannot be disregarded, especially since Congress has acted in this area in response to other Courts of Appeals decisions that it thought revealed statutory flaws requiring "correct[ion]." S. Rep. No. 98-583, p. 7, and n. 17 (1984).<sup>50</sup>

Souter, like several of his fellow justices, derives meaning from the fact that Congress has not taken action to reverse the interpretation of a particular statute from an earlier case, in this situation a case from the Court of Appeals, knowing full well that Congress will act when it sees a need to make a "correction." Interestingly, Souter also specifically cites to a Senate committee report on a separate bill that sought to "correct" other Courts of Appeals cases interpreting the same statute with which

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<sup>46</sup> 502 U.S. 197; 112 S. Ct. 560; 116 L. Ed. 2d 560 (1991).

<sup>47</sup> 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233 (1964).

<sup>48</sup> 502 U.S. at 202 (1991).

<sup>49</sup> 511 U.S. 485; 114 S. Ct. 1732; 128 L. Ed. 2d 517 (1994)

<sup>50</sup> 511 U.S. at 500 (1994).

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Congress did not agree and sought to reverse. This demonstrates a more intimate familiarity with the legislative process and how earlier decisions by the Supreme Court and even lower federal courts have fared in that process.

In this section, I have relied on unique examples of various reaction bills and corresponding court cases, as well as statements from members of Congress and Supreme Court Justices, to demonstrate that members of both of these branches monitor how their own activity is interpreted by one another and how this effects the behavior of the actors within each of these institutions. In commenting on a similar process, Pickerill argues that the Court's power of judicial review through which various statutes are found to be unconstitutional and, in turn, motivates Congress to revisit the now defunct statute can be understood as a "unique tool of deliberation" whereby the Court can force Congress "to be more deliberative on certain issues, or in a sense force Congress to incorporate judicial deliberations into the legislation" (2004, 59).

While I agree with this analysis, I believe it should be extended further such that it is understood to effect the deliberations of actors within both Congress and the Supreme Court. Through the reaction bills and laws discussed in this chapter, Congress has the opportunity to learn from various judicial insights as part of an ongoing effort to revisit and update the nation's statutory laws. Sometimes this means Congress must override a judicial decision and codify a contrary statutory meaning than what was decided by the Court. But, certain judicial decisions can also be informative in identifying gaps or problems with existing statutes that, in turn, motivate Congress to deliberate over necessary changes. Likewise, members of the Supreme Court appear cognizant of past congressional efforts to override or modify their earlier decisions, or the lack of such efforts. From this, based on the statements of the Justices themselves, the outcome of current cases can indeed be affected. In total, this suggests yet

another layer of support for concluding that reaction bills represent an important component of congressional/judicial relations impacting the broader lawmaking process.

### Conclusion

In support of the broader argument presented in this dissertation that the mode of governance in the United States, the relations between the branches of government, and the overall lawmaking process can be understood as far more cooperative than previously recognized, based on a system of interbranch signaling, it was first necessary to demonstrate the significance of the reaction bill process and its impact on members of Congress and the federal courts. This chapter has demonstrated that reaction bills and public laws represent a regular and sizeable portion of the overall legislative activity in Congress and that, when measured against the “significant” or “important” pieces of legislation produced by Congress, they constitute an even higher percentage of the major pieces of legislation produced over the years. A wide array of data has also been presented in this chapter showing both as an absolute number, and as a percentage of the Supreme Court’s annual docket, that the number of Supreme Court cases reacted to in Congress is quite high. Finally, based on statements from members of Congress and Supreme Court justices, I have shown a close understanding on the part of the actors within these branches of the reaction bill process and how decisions by these two coordinate branches affects the behavior of each. These findings, however, are only part of the story. At this point, it is still unclear as to the scope of reaction bills within Congress itself as well as the specific reasons why Congress may choose to respond to one or more court decisions and not others. These topics are taken up in the remaining chapters.

## **Appendix A: Coding Rules for Identifying Reaction Bills/Laws**

To identify reaction bills, I began the process by collecting all available electronic versions of committee reports from the House and Senate, as well as Joint, Special, and Select committees in Congress. The committee reports were collected from three distinct sources, due in part to their availability. Most of the committee reports were collected from “Thomas,” the online service offered by the Library of Congress. Thomas, however, only makes available electronic versions of the committee reports from present day back through the 104<sup>th</sup> Congress (1995-1996). To go back further in time, I relied on the Lexis Congressional Universe and Westlaw databases. Lexis Congressional has copies of the committee reports dating back to 1990. As a result, for the 102<sup>nd</sup> and 103<sup>rd</sup> Congresses, I was able to obtain a complete set of committee reports from this database. For 1990, however, Lexis Congressional Universe only has a partial set of committee reports. To obtain the complete set of committee reports for 1990 (101<sup>st</sup> Congress, Second session), I relied on the Westlaw database. Prior to 1990, I was unable to locate any database or legislative service that had electronic versions of the committee reports. The only resource that has some of the committee reports prior to 1990 is the U.S.C.C.A.N. reporter, which is housed within westlaw.com. I will discuss the collection of the committee reports from this resource separately.

Obtaining the reports from each of these three sources also proceeded along separate tracks. Within Thomas, there is a page dedicated to committee reports. I began by selecting the Congress I wished to obtain reports from (i.e. the 105<sup>th</sup> Congress), and at the bottom of each page there is a box for searching for reports within a particular date range. While each Congress covers a two-year period, due to the volume of reports, I would collect the reports on roughly an annualized basis. Thus, I would set the search parameters from January 1<sup>st</sup> of any given year through February 28<sup>th</sup> of the following year. I set up a 14-month window for each of the searches because Thomas dates the reports based on their publication date. The overwhelming majority of the reports are published within the same year that the committee did its work, but due to the volume of reports some of them are not published until the following calendar year. Also, this allowed me to search the “Activity Reports” that are produced by many of the committees in Congress summarizing their activities from the prior year in order to verify the presence of reactionary elements within different bills. This search would then return a list of several hundred committee reports, with hyperlinks to the full text of each of the reports. I then relied on a macro within the Firefox web browser to automatically download and save copies of the reports, as “text” files (.txt) on my computer hard drive. I repeated this process for each year from 1995 through 2008.

Within the Lexis and Westlaw databases, there is a considerable amount of legislative history beyond just the committee reports, so I had to focus my search on identifying only the committee reports produced during each legislative session of Congress. Each of the committee reports have one of four unique identifiers that set them apart from other materials in a bill’s legislative history. Thus, I searched for the occurrence of any of the following four terms within both of these databases to locate the pertinent committee reports: (1) “H.R. Rep.”; (2) “S. Rep.”; (3) “H.R. Conf. Rep.”; (4) “S. Conf. Rep.”. I also limited my searches by year so that for each search I conducted it would only return committee

reports for one session from each Congress. Each of these searches would return a list of all the available committee reports, and like the case with the reports from Thomas I then downloaded all of these reports onto my hard drive to search at a later point. Through this process, I obtained reports for the 102<sup>nd</sup> and the 103<sup>rd</sup> Congresses from Lexis and for the second session of the 101<sup>st</sup> Congress from Westlaw.

For the period of 1985 through 1989, all the committee reports produced by Congress were not available in electronic format. The only available committee reports for this time period that are available are those that are collected by the U.S.C.C.A.N. legislative digest, which is also housed electronically on westlaw.com. U.S.C.C.A.N. only publishes committee reports for major pieces of legislation, as determined by the editors of that volume, for each session of Congress. My search of U.S.C.C.A.N. proceeded along the same path as described above, but instead of searching under the “all public laws” database in westlaw.com, I instead selected the “U.S.C.C.A.N.” database. Because this legislative digest only reproduces those committee reports attached to more important pieces of legislation, the amount of reports located and downloaded onto my hard drive for this period was considerably smaller in comparison to the period from 1990 through 2008.

Upon obtaining electronic copies of the committee reports for the 99<sup>th</sup> through 110<sup>th</sup> Congresses (1985-2008), I began the process of analyzing the data through the use of a qualitative software tool called “Atlas.ti” (hereinafter referred to as Atlas). This software workbench allows users to search, analyze and organize large bodies of text, audio, graphical or video data into a variety of different forms. In my case, I had around 14,000 committee reports totaling around one-half of a million pages to analyze in an effort to locate passages or sections within these reports indicating that at least one purpose of the bill was to react to one or more federal court cases. The process for searching and analyzing these reports within Atlas was as follows. The central workspace within Atlas is what its designers refer to as the Hermeneutic United Editor (“HU”). Within each HU, the user uploads the primary documents that they want to work with creating a unique workspace for analysis. Due to the volume of data that needed to be analyzed, I created a unique HU for each session of Congress (i.e. the 105<sup>th</sup> Congress, Second session). All of the committee reports for each given session were uploaded into their own unique HU for analysis.

After each HU was created and labeled to correspond to one session of Congress, I began the process of searching the data. Atlas allows the user to create particular codes that can be attached to various passages in the text of the documents being searched based on the occurrence of particular words or phrases in those documents. Once the code is established, the user then specifies the search terms associated with that code and the amount of text in the document that the code will be mapped onto within each primary document. For example, the designated code could be assigned to match up to the precise location of the search term, or it can be expanded out to match at the sentence level or what the program refers to as the “single hard return” or “multiple hard return levels,” which are roughly equivalent to the paragraph or multiple paragraph levels in the text (a single hard return is technically defined by the Atlas software as the point in the text where the “enter” key is pushed resulting in a new line of text being created. Often this is after a natural paragraph, but it can be a much smaller amount of text or even just a line break.). These latter options allow the user to assign a code to an entire

paragraph of text, for example, where one of the search terms appears somewhere within that paragraph.

For purposes of my search of the documents, I created three distinct codes with various search terms and phrases within each code. The codes, and corresponding search terms within each code, were created after reviewing a random selection of dozens of committee reports previously identified by Eskridge (1991) as being override bills. In reading those reports, I developed a list of the most common terms and phrases displayed in these committee reports attached to override bills. I used this information to develop my own search parameters so that I could effectively and efficiently search the thousands of reports that was required. As a result, the list of search terms is not comprehensive in that it includes every possible word or phrase that might indicate the presence of a reaction bill. Given the volume of data, it was necessary to strike a balance between conducting an efficient search that would not take many years to complete and an accurate search that would do a good job of identifying most of the reaction bills produced by Congress. The following codes and search terms represent my best effort to achieve this balance.

The first code was labeled “reaction,” and it included the following search parameters:

overrid\*|overrul\*|revers\*|modif\*|clarif\*|adopt\*|codif\*|annul\*|revoke\*|veto|  
nullif\*|adjust\*|correct\*|accept\*|affirm\*|react\*|overturn\*|respond\*|approv\*|negate|revis\*

The “\*” symbol after most of the terms is a root expander to search for plural and other variations of these words. So, for instance, the term “overrid\*” will include variants such as “overrides” and “overridden.” The “|” symbol separates the search terms from one another. The purpose of this code was to identify any portions of the text within these committee reports where verbs and other forms of speech indicating some level of responsiveness to what might be one or more court cases might be located. The second code was labeled “court”, and it included the following search parameters:

court\*|decision\*|case\*|appeal\*|circuit\*|opinion\*|Cir.|Ct.

This code and the corresponding search terms were designed to locate portions of the committee report where terms commonly associated with a court were used. So, for example this code would identify text that said “the court found...” or “this decision must be overridden...” or “the judicial opinion came to the wrong conclusion...”. The final code was labeled “reporter,” and it included the following search parameters:

v.|S.Ct.|L. Ed.|F.3d|F.2d|F. Supp.|B.R.|Vet. App.|M.J.|Fed. Cl. |Ct. Int’l Trade|T.C.

It is standard practice in the committee reports attached to these various bills to mention the specific case or set of cases that is prompting the reaction bill. As a result, this code was designed to identify those symbols and abbreviations, at least one of which, is almost always included in a discussion of a particular case. So, for instance, the “v.” identifies those sections in the text where the name of a case is mentioned, such as “Doe v. Smith.” The other symbols are abbreviations for the various levels of the federal court system and the reporters that the decisions are located within. Often when citing to a particular case, at least part of the case citation would be included in the committee report. So, by including these abbreviations I can capture that part of the text. In some ways this code is redundant

with the “court” code as they capture similar discussions. But, given the volume of data that must be searched, there are many places in these reports where the word “court,” as an example, is used, but the bill itself is in no way responsive to an actual case. As I will discuss in a moment, when I combine these two codes it substantially increases the likelihood that an actual court case is being discussed, allowing me to search the text more efficiently and in a more targeted fashion.

Once each of the three codes was established, Atlas automatically searches all of the primary documents within the HU for any occurrence of the relevant term or phrase and, upon locating such text, codes the particular section of any given primary document as designated. I set up Atlas so that it would code the text on the “single hard return” level, which is generally equivalent to a paragraph in the text. After the search using each of the three codes had been completed, I then utilized the “query” tool within Atlas. The query tool allows the user to combine two or more codes in several unique fashions relying on a series of operators provided for within Atlas. Thus, for instance, the user can specify a query whereby the codes “court” and “reporter” both occur within the same primary document by relying on the “and” operator, or the user could be even more specific by relying on the “within” operator so that one can locate where these same two terms occur “within” the same “single hard return.” When the user combines two or more codes with these various operators, Atlas then allows the user to create a new “supercode” based on that specific query. By creating the supercode, Atlas displays all the different passages within the HU that meet the criteria of the user specified query. This tool allows the user to focus in on only those passages in the text that are most likely to be of interest.

For my purposes, I used the query tool to create five distinct supercodes. Some of the supercodes were partially redundant, but I determined the duplication in effort was necessary to increase the likelihood that I was locating as many bills as possible that could be designated as reaction bills. The primary supercode was labeled: “court WITHIN reporter WITHIN reaction”. This query located every section within the HU where the codes “court,” “reporter,” and “reaction” all occurred within the same single hard return (roughly equivalent to a paragraph). Thus, if a particular passage in a committee report said something like “the purpose of this bill is to override the court’s decision in Doe v. Smith” that section of the text would be included within this supercode, because it includes terms from all three codes occurring within the same single hard return. Using these supercodes allowed me to quickly identify and label such a bill as a reaction bill. Reviewing the returns from this supercode was always my first step in locating reaction bills, as any sections in the text where these three codes could be found in close proximity to one another meant that there was a strong likelihood that the bill was a reaction bill.

Due to the fact that the committee reports are not always as explicit and straightforward as one would hope in specifying that a particular bill was designed to react to one or more court decisions, I had to create four additional supercodes in an effort to broaden the search. The query tool has two additional operators that allow the user to search for the occurrence of specific codes that either precede or follow other codes by a designated number of lines. Within Atlas, each single hard return is given a sequential number, so by using these operators the user can locate sections in the text where, for example, the term “court” precedes the term “reporter” by 25 lines or less (the number of lines is specified by the user). Creating these additional supercodes that rely on these two operators was necessary because in one paragraph of the report it may say something to the effect of “the purpose of these bill is to reverse a recent decision by the Supreme Court” without making mention of any specific case. Then, 20 lines later, the report may say “the case at issue here is Doe v. Smith.” My primary supercode that finds section in the text where all three codes occur within the same single hard return would not pick up this result, but such an example is located by one or more of these additional four supercodes. This does result in quite a bit of redundancy in terms of the results, but I found it was necessary to make sure I

## Chapter 2: The Significance of Reaction Bills

was locating as many reaction bills as was reasonably possible. The queries for these four additional codes were as follows: (1) court PRECEDES: 25 reporter PRECEDES: 50 reaction; (2) court PRECEDES: 25 reporter FOLLOWS: 50 reaction; (3) court FOLLOWS: 25 reporter FOLLOWS: 50 reaction; (4) court FOLLOWS: 25 reporter PRECEDES: 50 reaction.

With each of the five supercodes established, I then searched the results that were returned from each of the supercodes. The results are hyperlinked within Atlas to the specific section within each primary document (i.e. the committee report) where the parameters for the supercode are met. After reviewing each of these sections, if it appeared that the committee report attached to a particular bill indicated the presence of a reaction bill, I then read the entire committee report to confirm the presence or absence of a reaction bill. As discussed earlier, for a bill to qualify as a reaction bill the committee report had to include some discussion that at least part of the bill was responsive to, in terms of being designed to override, reverse, modify, or codify, one or more court decisions along with some identifying marker for the case(s) such as a case name or a citation for the decision. Upon identifying the committee reports attached to reaction bills, I recorded a number of details on each of the bills and reports that will be discussed in greater detail in Chapter 3.





## Chapter 3

In today's policy-making environment, the potential significance of overrides may be greater than ever.

--Jeb Barnes<sup>1</sup>

In the prior chapters, I argued that the dominant theories of lawmaking and governance in the American system to emerge in recent years, based largely on rational choice analysis, ignores the findings that much of the interactions between the branches in this process are far more cooperative than previously recognized and largely omit an important role played by the judiciary in the development of public policy. Support for such an argument, however, requires objectively derived foundational elements supported empirically. The first of such pillars was offered in Chapter 2 with detailed support for the argument that the federal judiciary and Congress regularly and frequently interact with one another in the policy making process and that reaction bills make up a sizeable percentage of the more significant legislation Congress produces each legislative session. To complement these findings, it was also necessary to objectively examine the nature of the behavior among actors in the distinct branches of government, independently and as they interact. Rational choice analysis assumes that the interactions between the branches are driven by conflict wherein these elite actors battle (and bargain) with one another to secure their preferred policy position.

In support of this state-centered/cooperative model, which is built on an idea of cooperation and a mutual interest across the branches to achieve good policy and enhance state authority, as outlined in Chapter 1, it is also necessary to examine the behavior of members of Congress, the Supreme Court, and how these two branches behave when interacting with one another as laws are crafted, applied, and interpreted. This chapter begins that process by detailing the behavior of members of Congress within the context of producing reaction bills.

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<sup>1</sup> 2004. *Overruled? Legislative Overrides, Pluralism, and Contemporary Court-Congress Relations*. (Stanford: Stanford University Press), 34.

### Chapter 3: Congressional Behavior & Reaction Bills

The information supplied below is largely descriptive and details how the bills themselves are developed within Congress in addition to exploring various common traits between the hundreds of different bills that offer considerable insight behind what motivates congressional behavior in reacting to particular cases. A proper description of these features is important because there has yet to be a systematic accounting of the various components of reaction bills within Congress. Through a richer understanding of how this type of legislation is developed, more general conclusions as to the behavior of members of Congress can be drawn, which will be discussed at the end of the chapter.

To summarize, the analysis herein begins by detailing a variety of characteristics of reaction bills within Congress, beginning by examining what committees, if any, both within each chamber and across chambers, have undertaken the primary responsibility for monitoring court decisions and developing reaction bills? What type of statutes and policies are most often addressed in these reaction bills? Is there any general lag period between the time a court decision is issued and the time a reaction bill emerges? How successful are bills of this nature at navigating the various legislative and executive veto points faced by any bill and does the success rate of these bills fluctuate during different political eras within both Congress and the Presidency? Do reaction bills most often reflect efforts to “override” court decisions, or do they have other purposes, for instance an effort to “codify” court decisions? Finally, I explore some different indicators within the committee reports that are attached to these reaction bills in an effort to identify possible reasons, based on Congress’s own accounting behind the development of these bills, as to why certain cases may be selected for a congressional response. These final sections represent an important transition into the final section of the dissertation, Part III, where I test some of these same indicators against existing explanations for this behavior in Congress.

#### Committee Involvement

In what would later be recognized as the birth of American political science, Woodrow Wilson's dissertation, later published as *Congressional Government*, made the now infamous observation that "Congress in session is Congress on public exhibition, whilst Congress in its committee-rooms is Congress at work" (1963 [1885], 69). While Wilson's work in *Congressional Government* has remained provocative and controversial over the more than century since its publication, even today it is widely agreed that "his identification of congressional committees as the working centers of Congress was absolutely correct" (Stewart III 2001, 275). In the previous chapter, for this very reason, I argued that the official reports produced by the various committees in Congress represented the most logical and persuasive location to identify the purpose and scope of a particular bill and determine whether at least one of those intentions was to react to one or more court cases. Here, as I seek to better understand the internal process by which Congress goes about introducing and developing reaction bills, it is only natural, therefore, that I begin the analysis with an examination of which committees are most involved in the process of reacting to court decisions.

Identifying those committees most actively involved in developing reaction bills is important in understanding the nature and purpose of such legislation due to the unique nature of the committees themselves. Committees have existed in Congress since its early years. For example, the House Ways and Means Committee has existed largely in its present form since the 1790s. Historically, the jurisdiction of committees has been defined by custom and practice. This changed, however, in 1946 with the passage of the Legislative Reorganization Act ("LRA"). The LRA not only reduced the absolute number of committees that had come into existence over the years in both chambers, but it also developed clearer boundaries for the jurisdiction of the committees that remained. This introduced a degree of order into the legislative process, but it also enhanced the gatekeeping function of each committee as certain types of legislation were required to go through specific committees (recognizing of course that to this day the boundaries of each committee's jurisdiction are not always clear or are

overlapping, which results in conflict between some committees as they seek to control the legislation). While the absolute number and jurisdiction of the committees have changed on a few occasions since the passage of the LRA, such as in 1995 when Republicans changed the House Committee system, there has been considerable consistency in this system throughout the post-World War II era. Thus, with the jurisdiction of each committee more clearly defined, exploring which committees produce the most reaction bills reveals a number of important characteristics about the underlying bills and the behavior of Congress in their production.

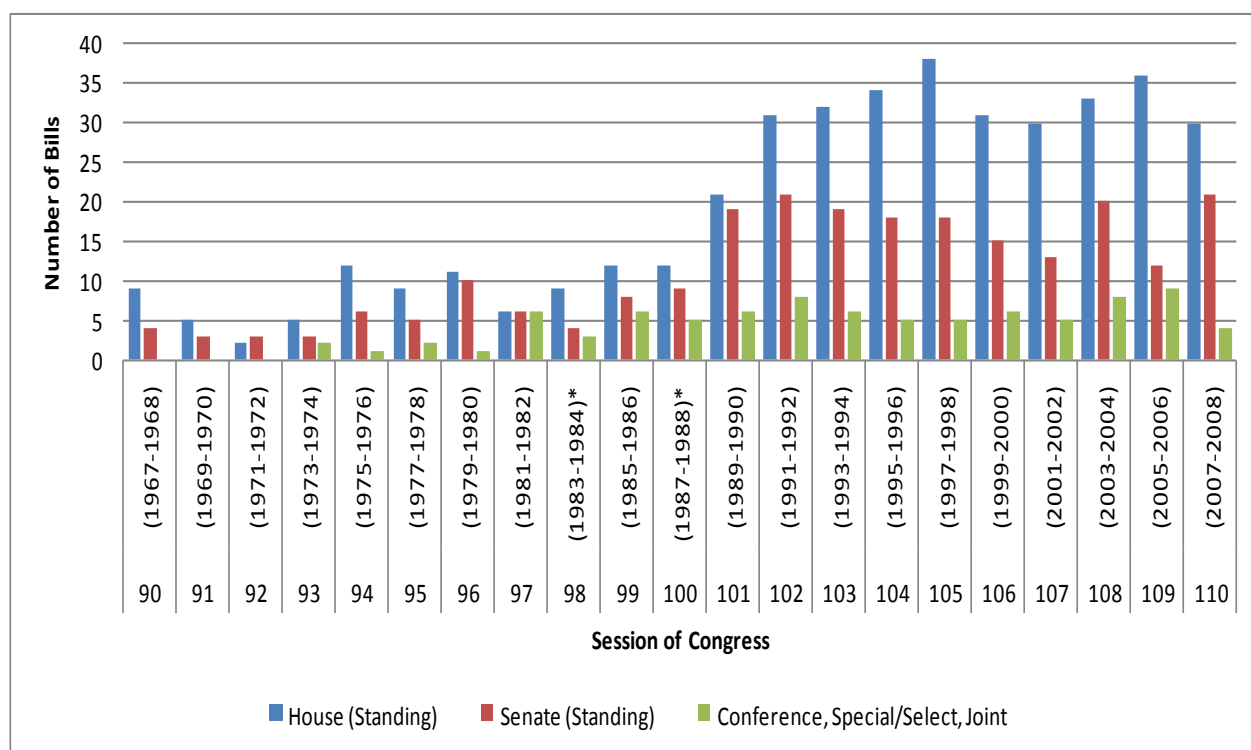
Committees in the United States House of Representatives and Senate are generally divided into four types.<sup>2</sup> The two most important types of committees that are responsible for the vast majority of legislation produced in Congress are the Standing committees and the Conference committees. Each chamber has a set of standing committees that are more or less permanent and are responsible for considering and reporting on the different bills introduced by the members of Congress within their respective chambers. The rules of each chamber define the jurisdiction of the various standing committees. Conference committees, on the other hand, are formed on an *ad hoc* basis and consist of members of both chambers. The presiding officer appoints members from their respective chambers (usually consisting of those members who sat on the standing committee responsible for the original legislation) to reconcile differences between competing versions of the same legislation produced by both the House and Senate. The remaining two types of committees are Special and Select committees as well as Joint committees. Both of these types of committees, however, are convened to conduct special types of business for Congress, and they generally do not report on specific pieces of legislation.

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<sup>2</sup> There is a fifth type of committee within the House called the Committee of the Whole. This committee is made up of all members of the House, but technically it is not the House itself. It is, in effect, a procedural mechanism used by the House to transact more routine business while avoiding the more formal quorum and procedural rules that must be followed when the entire chamber is in session. While it has legislative authority, it generally does not consider substantive bills, and as a result, is not included as a category in this analysis.

### Chapter 3: Congressional Behavior & Reaction Bills

In the analysis that follows, the activity of all four types of committees within the arena of reaction bills is reported, notwithstanding the fact that almost all of the reaction bills and accompanying committee reports are produced by the Standing committees of each chamber and the Joint Conference committees. At the outset of the 110<sup>th</sup> Congress, there were 20 separate Standing committees in the House of Representatives and 16 Standing committees in the Senate. As this is a historical project, and because the number of name of committees has changed over time, included in this list of standing committees is a reference to any historical committee that had jurisdiction equivalent to, or overlapping, the committee now in existence. Thus, if a bill and accompanying committee report were produced by a Standing committee no longer in existence, they were recorded as being produced by the now-existing committee that has jurisdiction in that same policy area. Separately, I recorded how many Conference committees produced reaction bills along with any Special, Select, or Joint committees.



**Figure 3.1: Reaction Bills by Chamber/Special Committee, Per Term of Congress: 1967-2008**

**Note:** For Sessions of Congress denoted with a “\*” there is one report missing from the totals due to a lack of identification in the report itself of the chamber from which the bill originated.

**Source:** Compilation by author from analysis of the texts of U.S. House and Senate committee reports attached to legislation produced between 1967 and 2008.

Relying on the complete list of reaction bills from 1967 through 2008, Figure 3.1 displays the number of reaction bills produced by the various Standing committees within each chamber per term of Congress. There is a consistent disparity between how many reaction bills are produced by the various Standing committees in the respective chambers, with the House consistently outpacing the Senate in the number of bills produced. With the exception of the 92<sup>nd</sup> Congress, the House always produced considerably more reaction bills in comparison to the Senate, and in some cases this disparity was quite large. For example, the gap between the House and Senate during the 109<sup>th</sup> and 107<sup>th</sup> Congresses was 36-12 and 30-13, respectively, between the chambers. In total, 408 of the reaction bills were produced by the various standing committees in the House; whereas 237 bills were generated by the various standing committees in the Senate. The remaining 88 reaction bills were produced mostly by the different Conference committees, with the remainder being generated by a few Special and Select

committees in one of the two chambers. On average, the House committees produced around 19 bills per term of Congress with the Senate at slightly over 11 per term, nearly a two-to-one ratio between chambers.

The disparity here in the absolute number of reaction bills produced, however, is overstated given two interrelated legislative realities. The membership in the House is quite a bit larger in comparison to the Senate, presently at 435 members of the House versus 100 Senators. As a result, the House has more members introducing legislation, more committees considering all this legislation, and greater financial resources working on all this legislation. While, historically, each chamber has passed an aggregate number of bills roughly on par with one another, the number of measures introduced in the House is typically several thousand greater than the Senate each session. Table 3.1 documents the number of measures introduced and bills passed within each chamber over the past twenty years, confirming this disparity. The number of bills introduced in the House each legislative session over this time period averages 3,596 bills per session in the House versus 1,926 on average in the Senate. This gap closes, however, when looking at the number of bills passed, as the House averages around 693 per session and the Senate is at 572. Additionally, on a per member basis, the Senate is far more active in the amount of legislation it considers and passes. Over twice as many reaction bills are introduced and around three times as many pass in the Senate versus the House on a per capita basis. Thus, regardless of how it is measured, it is reasonable to conclude that both chambers are active and regular participants in the broader reaction bill process.

**Table 3.1: Measures Introduced & Bills Passed: 1987-2008**

Measures Introduced	Bills Passed
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### Chapter 3: Congressional Behavior & Reaction Bills

Congress	Year	House	Senate	House	Senate
110-2	2008	3225	1590	999	589
110-1	2007	6194	3033	1127	621
109-2	2006	2451	2302	710	635
109-1	2005	5703	2618	715	624
108-2	2004	2338	1318	747	663
108-1	2003	4616	2398	674	590
107-2	2002	2711	1558	623	523
107-1	2001	4318	2212	592	425
106-2	2000	2701	1546	877	696
106-1	1999	4241	2352	657	549
105-2	1998	2254	1321	642	506
105-1	1997	3728	1840	544	385
104-2	1996	1899	860	529	476
104-1	1995	3430	1801	483	346
103-2	1994	2104	999	579	465
103-1	1993	4543	2178	547	473
102-2	1992	2714	1544	746	651
102-1	1991	5057	2701	592	626
101-2	1990	2769	1636	772	716
101-1	1989	4842	2548	598	605
100-2	1988	2412	1328	858	814
100-1	1987	4857	2685	644	616
Average	1987-2008	3596	1926	693	572
Per Capita	1987-2008	8	19	2	6

Source: Compilation of author based on review and analysis of "Final Resume of Congressional Activity, Daily Digest (100<sup>th</sup> through 110<sup>th</sup> Congress)". The data is located at:  
[http://www.senate.gov/pagelayout/reference/two\\_column\\_table/Resumes.htm](http://www.senate.gov/pagelayout/reference/two_column_table/Resumes.htm)

While both chambers regularly produce a consistent number of reaction bills the activity of specific committees within each of the chambers varies widely. Table 3.2 displays information on the 20 different standing committees in the House of Representatives and the number of reaction bills produced by each of these committees. Several important pieces of information emerge from analyzing this data. First, by far, the Judiciary Committee in the House is the most active committee in the arena of reaction bills. Of the 408 reaction bills generated in the House between 1967 and 2008, 172 of them were produced by the Judiciary Committee. The next closest is the Education and Workforce

### Chapter 3: Congressional Behavior & Reaction Bills

Committee, producing 40 reaction bills across this same period. On the surface, it is not surprising that the Judiciary Committee would be responsible for the plurality of reaction bills given that these bills are responsive to court cases, which the Judiciary Committee is presumably more aware of than any other committee. But, by examining the specific jurisdiction of this committee its close involvement in reaction bills is even more readily apparent.

**Table 3.2: Number of Bills Per Committee, by Frequency (House): 1967-2008**

House Committee Name	Total Bills
Judiciary	172
Education and Workforce (Economic and Educational Opportunities 1995-1996;	40

### Chapter 3: Congressional Behavior & Reaction Bills

Education and Labor 1947-1994)	
Ways and Means	35
Energy and Commerce (Energy and Commerce Committee, 1981-1994; Interstate and Foreign Commerce Committee, 1947-1981)	33
Natural Resources (Natural Resources 1993-1994; Interior and Insular Affairs Committee 1951-1992; Public Lands, 1947-1951)	32
Oversight and Government Reform (District of Columbia Committee 1947-1994; Government Operations Committee, 1953-1992; Expenditures in the Executive Departments, 1947-1952; Post Office and Civil Service Committee 1947-1994)	21
Transportation and Infrastructure (Merchant Marine and Fisheries, 1947-1994; Public Works and Transportation 1975-1994; Public Works, 1947-1975)	15
Veterans' Affairs	12
Banking & Financial Services (Banking, Finance, and Urban Affairs Committee 1978-1994; Banking, Currency, and Housing, 1975-1977; Banking and Currency, 1947-1975)	11
Budget	10
Appropriations	7
Agriculture	6
Rules	6
Armed Services (National Security Committee 1995-1998; Armed Services Committee 1947-1994)	5
House Administration (House Oversight Committee 1995-1999; House Administration Committee 1947-1994)	3
International Relations (Foreign Affairs Committee, 1979-1994; International Relations Committee, 1975-1979; Foreign Affairs Committee, 1947-1975)	1
Homeland Security	0
Science (Science, Space, and Technology, 1987-1994; Science and Technology, 1975-1987; Science and Astronautics, 1959-1975)	0
Small Business (Select Committee on Small Business 1947-1974)	0
Standards of Officials Conduct (Select Committee on Standards and Conduct 1965-1967)	0

Source: Compilation by author from analysis of the texts of U.S. House and Senate committee reports attached to legislation produced between 1967 and 2008.

Later, in Table 3.4, I document the specific jurisdictional boundaries of the Judiciary Committees in both the House and Senate. For the House, one of the 19 listed areas of responsibility for the Judiciary Committee calls for the “revision and codification of the Statutes of the United States.” As I have alluded to throughout this dissertation, and will further document later in this chapter, reaction bills and laws primarily involve making modifications to existing statutes-at-large as a consequence of a particular decision by one or more courts. Thus, it is to be expected that the committee responsible for making revisions to the United States Statutes would be most heavily involved in producing reaction bills. This committee also has responsibility for making Constitutional amendments, enforcing the

criminal laws of the United States, and overseeing the federal courts and judicial proceedings, all of which are closely connected to the decisions issued by the various federal courts.

Notwithstanding the dominance of the House Judiciary Committee in the reaction bill process, the other important point to emerge from this data is that a large number of other committees also produce a considerable number of reaction bills. Also, with just a few exceptions, every committee in the House has produced at least a few reaction bills, demonstrating the breadth of this process at least in terms of the total number of committees involved on some level. In particular, ten committees, including the Judiciary, representing half of all the standing committees in the House, produced at least 10 reaction bills throughout this time span. Several of the committees were particularly active, including the Education and Workforce Committee that generated 40 bills, the Ways and Means Committee that was responsible for 35, and the Energy and Commerce Committee that produced 33. While the Judiciary Committee was the most active in this area, nearly 60% of all reaction bills to emerge from the House came from the combined output of the other 19 committees. Additionally, in the House, all but four of the 20 committees produced at least one reaction bill. In combination, these two points arguably show that most members of the House have some familiarity with, and are involved in the production of, reaction bills, even if they sit on only those committees that are less heavily involved in this process.

A similar picture of activity emerges with the various Senate committees in the arena of reaction bills (See Table 3.3). As was the case in the House, the Senate Judiciary Committee is also the clear leader in the total number of reaction bills produced. Of the 237 reaction bills to emerge from one of the Senate committees during this time, 69 of them were produced by the Judiciary Committee. Like the House Judiciary Committee, the Senate Judiciary Committee has a similar jurisdictional mandate and relationship with the federal courts, which is outlined in Table 3.4. Thus, for the same reasons outlined

above, it is to be expected that this committee would be the most active in producing reaction bills.

Also, as was the case with the House, all but one of the 16 Senate standing committees produced at least one reaction bill, with several of the committees producing a relatively high number. For example, the Senate Finance Committee produced 38, and the Environment and Public Works Committee and the Commerce, Science, and Transportation Committee produced 22 and 21 bills respectively.

**Table 3.3: Number of Bills Per Committee, by Frequency (Senate): 1967-2008**

<b>Senate Committee Name</b>	<b>Total Bills</b>
Judiciary	69
Finance	38
Environment and Public Works (Public Works 1947-1977)	22
Commerce, Science, and Transportation (Commerce 1963-1977; Interstate and Foreign Commerce 1947-1963)	21
Health, Education, Labor, and Pensions (Labor and Human Resources Committee, 1979-1998, Human Resources, 1977-1979; Labor and Public Welfare, 1947-1977)	21
Banking, Housing, and Urban Affairs (Banking and Currency 1947-1972)	15
Veterans' Affairs	12
Homeland Security and Governmental Affairs (Government Operations 1953-1977; Expenditures in the Executive Departments 1947-1953)	11
Energy and Natural Resources (Interior and Insular Affairs 1950-1977; Public Lands 1947-1950)	9
Armed Services	7
Agriculture, Nutrition, and Forestry (Agriculture and Forestry 1947-1977)	4
Foreign Relations	3
Small Business and Entrepreneurship (Select Small Business Committee, 1949-1983; Special Committee to Study Problems of American Small Business 1947-1948)	3
Appropriations	2
Budget	2
Rules and Administration	0

Source: Compilation by author from analysis of the texts of U.S. House and Senate committee reports attached to legislation produced between 1967 and 2008.

It is also of interest to note the similar levels of activities between committees in these two distinct chambers that have similar jurisdictional boundaries. While a precise one-to-one correlation between committees in the two chambers is not possible because the amount and jurisdiction of the

committees in each chamber is somewhat different, on a general level, there is a close match between the most active committees in the House and Senate in terms of the production of reaction bills. In the House, the top five committees, in rank-order, for producing reaction bills are as follows: (1) Judiciary; (2) Education and Workforce; (3) Ways and Means; (4) Energy and Commerce; and (5) Natural Resources. In the Senate, the ranking of committees consists of: (1) Judiciary; (2) Finance; (3) Environment and Public Works; (4) Commerce, Science, and Transportation; (5) Health, Education, Labor, and Pensions. Each of these five committees has at least a partial, if not close, match in corresponding chamber. The two Judiciary Committees, both at number one on the list, represent an obvious match. The Finance Committee in the Senate, ranked at number two, matches up with the House Ways and Means Committee, which is ranked third there. Two of the remaining three sets of committees, while in a slightly different order, have a close match in the opposing chamber, with the House Education and Workforce Committee matching the Senate Health, Education, Labor, and Pensions Committee, and the House Energy and Commerce Committee matching the Senate Commerce, Science, and Transportation. The House Natural Resources Committee has the least degree of overlap with one of its counterparts in the Senate, the Environment and Public Works Committee, but the jurisdictions of these two committees do match in some areas making them, at least, analogous.

**Table 3.4: Jurisdiction of House & Senate Judiciary Committees, 110<sup>th</sup> Congress: 2007-2008**

House		Senate
Apportionment of Representatives		Apportionment of Representatives
Bankruptcy, mutiny, espionage, and counterfeiting		Bankruptcy, mutiny, espionage, and counterfeiting

### Chapter 3: Congressional Behavior & Reaction Bills

Civil liberties		Civil liberties
Constitutional amendments		Constitutional amendments
Federal courts and judges, and local courts in the Territories and possessions		Federal courts and judges
Members of Congress, attendance of members, Delegates, and the Resident Commissioner; and their acceptance of incompatible offices		Government information
Administrative practice and procedure		Holidays and celebrations
Immigration policy and non-border enforcement		Immigration and naturalization
Interstate compacts generally		Interstate compacts generally
The judiciary and judicial proceedings, civil and criminal		Judicial proceedings, civil and criminal, generally
		Local courts in territories and possessions
Claims against the United States		Measures relating to claims against the United States
National penitentiaries		National penitentiaries
Patents, the Patent and Trademark Office, copyrights, and trademarks		Patent Office
Presidential succession		Patents, copyrights, and trademarks
Protection of trade and commerce against unlawful restraints and monopolies		Protection of trade and commerce against unlawful restraints and monopolies
Revision and codification of the Statutes of the United States		Revision and codification of the statutes of the United States
State and territorial boundary lines		State and territorial boundary lines
Subversive activities affecting the internal security of the United States		
Criminal law enforcement		

Source: Rules of the Senate, Rule XXV: Standing Committees, located at: <http://rules.senate.gov/public/index.cfm?p=RuleXXV>  
Rules of the House of U.S. Representatives, Rule X: Organization of Committees, located at:  
[http://www.gpoaccess.gov/hrm/browse\\_110.html](http://www.gpoaccess.gov/hrm/browse_110.html)

In addition to the Standing committees of both chambers, which produce the overwhelming majority of reaction bills and their accompanying committee reports, there are several other types of committees in Congress responsible for this activity. The other types of committees that are involved include the Conference committees, Select or Special committees, and Joint committees. In Table 3.5, I

detail which of these committees produce reaction bills and among this category of committees who are responsible for these bills and how many they produce. Of the 88 reaction bills produced by one of these categories of committees, the various conference committees convened by Congress to resolve differences between the House and Senate versions of the same legislation were far and away the leaders in the production of reaction bills in this category, with a total of 64 bills. Since a Conference committee is really just an extension of the work done by the regular standing committees in each chamber, it is no surprise that this type of committee among these three categories is the most prolific in the area of reaction bills. Much of the work of any conference committee is reconciling competing provisions from the House and Senate, and if the original House or Senate bill had a reaction provision within it, it is to be expected that many of the bills and reports produced at conference would have this same feature. Of the remaining reaction bills produced by one of these remaining types of committees, most of the remainder came from the Senate Select Committee on Indian Affairs, which produced 21 reaction bills.

**Table 3.5: Number of Reaction Bills Per Committee (Joint, Special, Select): 1967-2008**

<b>Joint, Special, or Select Committee Name</b>	<b>Total Bills</b>
Conference	64
Indian Affairs	21
Select on Intelligence	3
Special on Aging	1



### Chapter 3: Congressional Behavior & Reaction Bills

Joint Economic (1957-Present; Economic Report Committee 1947- 1956)	0
Joint on the Library	0
Joint on Taxation	0
Joint on Printing	0
Select on Ethics	0

**Source: Compilation by author from analysis of the texts of U.S. House and Senate committee reports attached to legislation produced between 1967 and 2008.**

In analyzing and considering these results, an obvious question that emerges is why certain committees produce a disproportionately higher number of reaction bills than other committees? As noted earlier, an obvious starting point in answering this question is to understand the defined jurisdiction of these various committees. Since most of the reaction bills involve amendments to, or the creation of, statutory law, given that the cases these bills are reacting to generally involve a court interpreting one or more statutes, it is to be expected that the committee with responsibility to revise the statutes of the United States, the House and Senate Judiciary Committees, would be most involved in producing reaction bills. Another related explanation can possibly be found in the general policy area that these reaction bills address and how that relates to the jurisdiction and work of these various committees, especially those more actively engaged in producing reaction bills. This point will be explored more in depth in a later section in this chapter where the types of policies that make up these reaction bills are detailed.

A third possible reason for the disparity in reaction bills produced by the committees may be endogenous to the committees themselves. All committees in both the House and Senate are not equal, at least when it comes to resource allocation. Some committees have more members, larger budgets, and greater numbers of staff, all of which may have some influence on the number of reaction bills they produce. One explanation for such a relationship can be derived from the fact that, by definition, reaction bills involve a response to one or more federal court cases. This means there must

be some mechanism within these committees for detecting these cases. One hypothesis for explaining this detection mechanism is that constituents and lobbyists contact members of Congress, and their staffs, about concerns over certain cases and demand a legislative response. Thus, the more members on a particular committee the more reaction bills they might produce because of the increased constituent demands. A competing hypothesis may be that the committees themselves are primarily responsible for detecting these cases and craft these bills out of a concern for guarding congressional power. Therefore, committees with greater resources have an enhanced capacity to craft reactionary bills due to their greater awareness (through staff diligence) of the cases that may demand a response. Indeed, Eskridge (1991) argues that the dramatic upturn in the number of reaction bills beginning in the mid-1970s, which has held steady since that time, was due in part to an increase in available committee resources around that same time.

In Tables 3.6 and 3.7, a variety of different measures for determining the resources of each of the Standing committees in the House and Senate are presented. The data is just a snapshot from one particular Congress, the 106<sup>th</sup> (1999-2000), but it is generally representative of the make-up of these committees in the modern era. In both tables, information is presented on the total number of members of Congress who sit on each of these committees, the size of the committee's staff, the number of subcommittees, and the committee's overall budget.<sup>3</sup>

Table 3.6 details this information for the then-19 different Standing committees in the House. In terms of the number of members sitting on these various House committees, the five largest, in order, include: (1) Transportation and Infrastructure; (2) Appropriations; (3) Armed Services; (4) Banking and Financial Services; and (5) Commerce. The number of subcommittees within each of these committees is also at, or in some cases well above, the median number of subcommittees for each

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<sup>3</sup> Data supplied by Stewart III 2001, 280-81; citing Ornstein, Mann, and Malbin 2000.

committee, which stands at five. With the exception of the Commerce Committee (presently called the Energy and Commerce Committee), referring back to Table 3.3, none of these committees match the top five most active committees in terms of the production of reaction bills. Such a finding is suggestive of the possibility that the conduit for detecting cases to which Congress may want to respond through a reaction bill is not the individual members of Congress themselves.

In comparing those committees with the largest staffs and budgets, with those committees most active in producing reaction bills, however, the picture is somewhat different. Of the five House committees outlined in Table 3.3 that produce the largest number of reaction bills, each of them have staffs in excess of the median of 64 staff members for each House committee. The Commerce Committee has the third highest number of staff members, at 94, and the Judiciary Committee has the fifth highest at 85. Similarly, the budgets, which are an important indicator of resource availability, for each of the five most active committees in the House to produce reaction bills are also all well above the median annual budget amount of \$10.3 million. Again, Commerce and the Judiciary have the third and fifth highest budgets, respectively, of all House Committees, and these two committees are some of the most prolific producers of reaction bills in the House.

**Table 3.6: Committee Resources (House) (106<sup>th</sup> Congress)**

Committee Name	# of MCs	Staff Size	# of Subcommittees	Budget (\$ millions)
Agriculture	51	62	4	\$8.4
Appropriations	61	156	13	\$21.3
Armed Services	60	60	5	\$10.3
Banking and Financial Services	59	64	5	\$9.3
Budget	43	61	0	\$9.9

### Chapter 3: Congressional Behavior & Reaction Bills

Commerce	53	94	5	\$15.3
Education and the Workforce	49	77	5	\$11.2
Government Reform	43	120	8	\$19.8
House Administration	9	36	0	\$6.3
International Relations	49	73	5	\$11.3
Judiciary	37	85	5	\$12.2
Resources	52	71	5	\$10.6
Rules	13	41	2	\$5.1
Science	47	63	4	\$8.9
Small Business	36	40	5	\$4.1
Standards of Official Conduct	10	11	0	\$2.6
Transportation and Infrastructure	75	84	6	\$13.2
Veterans Affairs	31	27	3	\$4.7
Ways and Means	39	65	5	\$11.9
Average	43	68	4	\$10.3
Median	47	64	5	\$10.3

Source: Stewart, Charles III (2001, 280-81).

In Table 3.7, a similar analysis is presented with a focus on the committees in the Senate. The committees in the Senate are far more evenly staffed than their counterparts in the House, with all but five of the 16 consisting of between 18 and 20 members. But, as was the case in the House, the Senate committees with the most members sitting on them generally did not track with those Senate committees who produced the largest number of reaction bills. The Senate committees with the most members, in rank-order, consisted of: (1) Appropriations; (2) Budget and then a three-way tie at 20 members for (3) Armed Services; (4) Banking, Housing, and Urban Affairs; and (5) Commerce, Science, and Technology. Of those five, only the Commerce, Science, and Technology Committee overlaps with one of the top five producers of reaction bills in the Senate, as detailed in Table 3.4.

On the other hand, similar to the House, when examining the staff sizes of these committees and their budgets, there is a much closer correlation with those committees who are active in the area of reaction bills. With the exception of the Environment and Public Works committee, the remaining

top four committees in the Senate (as outlined in Table 3.4) to produce reaction bills are all well above the median point for staff size and budgets. The Judiciary Committee; Health, Education, Labor and Pensions Committee; and Commerce Science, and Technology Committee had the second, third, and fifth largest staffs of all the Senate committees respectively. In this same order, these three committees also had the third, fourth, and fifth largest budgets among the 16 Senate committees.

**Table 3.7: Committee Resources (Senate) (106<sup>th</sup> Congress)**

Committee Name	# of MCs	Staff Size	# of Subcommittees	Budget (\$ millions)
Agriculture, Nutrition, and Forestry	18	47	4	\$3.4
Appropriations	28	76	13	\$10.0
Armed Services	20	49	6	\$5.5
Banking, Housing, and Urban Affairs	20	51	5	\$5.8
Budget	22	48	0	\$6.3
Commerce, Science, and Technology	20	68	7	\$7.0
Energy and Natural Resources	20	39	4	\$5.3
Environment and Public Works	18	39	4	\$4.9
Finance	20	51	5	\$6.1
Foreign Relations	18	54	7	\$5.5
Governmental Affairs	16	147	3	\$9.2
Judiciary	18	141	7	\$8.8
Health, Education, Labor, and Pensions	18	94	4	\$8.3
Rules and Administration	16	27	0	\$2.7
Veterans' Affairs	12	21	0	\$1.3
Small Business	18	27	0	\$2.2
Average	19	61	4	\$5.8
Median	18	50	4	\$5.7

Source: Stewart, Charles III (2001, 280-81).

There is no perfect correlation between any of these measures of committee resources and those committees who produce the most reaction bills, nor is there a clear narrative that can be articulated. Nevertheless, there is some evidence to suggest that the amount of resources any given committee has, as measured by the size of their staff and their budgets, more closely correlates with

those committees in both the House and Senate that produce the highest number of reaction bills as opposed to the absolute number of members of Congress who serve on these various committees.

This evidence on the correlation between committee resources and the number of reaction bills produced by each of the respective committees has two potential broader impacts on congressional behavior and congressional-judicial relations. First, one theory, described in the literature as coordinate construction or the case saliency approach, behind why Congress reacts to certain court cases is that various members of the public, interests groups, and other political actors who are displeased with one or more aspects of the court's decision view Congress as the place of last resort to achieve a desired policy outcome that they could not get from the courts. The behavior of members of Congress, with their desire for reelection, is driven by these various interests. Thus, it would be logical to hypothesize that those committees with more members of Congress sitting on them would represent a larger constituency and in turn more court cases that this constituency would like to see addressed. There is little evidence, however, that the committees with the most members are the most active in developing reaction bills, which represents a possible counterpoint to the coordinate construction theory.

Separately, the evidence that those committees with larger staffs and budgets tend to match up with the main committees producing reaction bills evidences the fact that the development of reaction bills is endogenous to Congress itself and its interactions with the other branches. As a consequence of its decision to delegate some of its legislative authority to federal agencies, Congress is left with the remaining task of monitoring those agencies to ensure compliance with the underlying statutes and to respond to constituent grievances concerning agency behavior. Many of the committees with the largest staffs and budgets oversee or monitor a large array of federal agencies or some of the more significant departments, like the Justice Department. The decisions these agencies make to implement

the laws, for example by adopting a regulation, are often the subject of litigation in court, which body is responsible for interpreting the statute and any accompanying regulations. When the courts, through their decisions, demand revisions to the law, or suggest modifications by “signaling” problems to Congress, it is those committees who oversee these related agencies that become responsible for taking up consideration of any reforming legislation. Thus, the correlation between those committees with the most resources and the ones who take up the highest number of reaction bills stems from this original decision by Congress to delegate its legislative authority. Importantly, however, is that this data is suggestive of a motivating mechanism behind reaction bills that is centered within the desires of the political actors within three branches of government.

#### Case to Bill: Lag Period?

When the various congressional committees do embark on an effort to react to federal court decisions, they theoretically have millions of cases to focus on in generating a response. This is because court decisions do not have any statute of limitations, and they remain the law within whatever jurisdiction the court that issued the decision lies until that same court later decides to overrule its earlier decision or such action is taken by a higher appellate court. Earlier, in Chapter 2, I discussed the fact that decisions from all levels of the federal courts, ranging from the Supreme Court to the Court of International Trade, generate reaction bills in Congress. This was a critically important finding because it proves that in producing reaction bills Congress is not exclusively focused on its co-equal branch, the Supreme Court. In fact, on an aggregate basis, Congress responds far more often to decisions from the lower federal courts than it does the Supreme Court. In this section, I again return to an examination of the type of cases that Congress responds to, but in this instance, I focus on the lag period between when a case is decided by any of the federal courts and when Congress produces a reaction bill.

Devoting some attention to this lag period is important because it offers some important clues as to the overall process by which Congress responds to these various court decisions. It does this in several ways. First, the gap between the time when a decision is issued and when Congress responds is revealing in terms of how Congress comes to learn about these decisions. If, hypothetically, the vast majority of congressional responses came within a year or two after a decision was issued, this may be indicative of a more politically charged response to a salient case that was, for example, in the news recently and caught the attention of members of Congress themselves, their constituents, or various interest groups. If, on the other hand, the response period was longer and more steady across a broader range of time it would be less likely that the congressional response was being motivated solely by political considerations, as most cases tend to lose their relevancy and saliency in the eyes of the public with the passage of time. Second, this data is also an important commentary on the vitality of the court cases themselves. Do cases that were issued farther back in time have the same probability of generating a congressional response as compared to more recent cases? Such a question is important because it speaks to the vitality of “court-made” law as it ages as well as the process and legitimacy by which the courts themselves rely on their earlier precedent through the doctrine of *stare decisis*. Might the Supreme Court feel more confident relying on one of its earlier decisions from 30 years prior, knowing that it has not been reacted to in Congress, as opposed to a decision issued only two terms earlier that also has not received a response but is still fairly young? The information presented in this section provides insight in this relationship.

Figure 3.2, with data on all the cases that were subject to a reaction bill in Congress, regardless of the legislative outcome of that bill, and Figure 3.3, containing only those cases that were part of bills that became a new public law, each graph the number of cases relative to the time (in years) for a reaction bill to be produced. Thus, for example, a decision issued in 2006 that was subject to a reaction bill during the second session of the 110<sup>th</sup> Congress (2008) was placed into the two-year interval. Since



most of the cases were responded to by Congress within a decade of their issuance, each of the first ten years is accounted for at discrete time intervals. Beyond the ten-year mark, there are three remaining intervals for those cases occurring between 11 and 20 years, 21 and 50 years, and 51 years and beyond. The results, as displayed in each of the two figures, one measuring all reaction bills and the other only those bills that became public law, largely parallel one another.

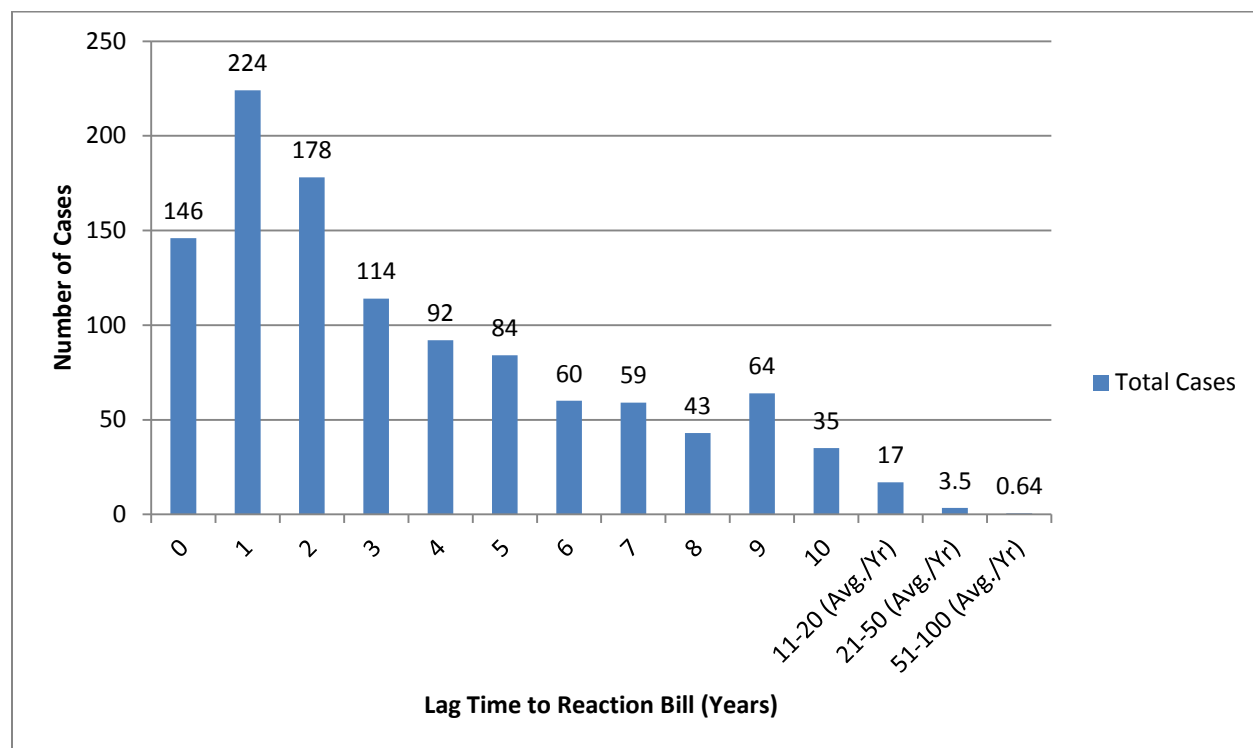
The single most populated time interval in both figures is year “one,” as 224 of the over 1400 cases that were subject to a reaction bill, displayed in Figure 3.1, and 114 of the over 750 cases subject to a reaction bill that became law, as represented in Figure 3.2, fell into this time interval. Within both figures, focusing exclusively on the first ten year period, the year “two” interval and the year “zero” interval were the second and third highest categories respectively. In each of the years between intervals three through ten, there was still a considerable amount of activity, but the numbers progressively decreased at fairly regular intervals across this time span. Thus, for instance, in Figure 3.1, at interval year “three” there were 114 cases and by year “ten” there were 35 cases.

While most of the cases that are reacted to are relatively recent, the results also confirm that a significant percentage of older cases still receive a legislative response.<sup>4</sup> In Figure 3.1, most of the time intervals in years “three” through “ten” saw at least 50 cases subject to a response. Similar results can be seen in Figure 3.2 as well, as most of the intervals across this same time span included at least 30 cases. In both figures, the year intervals beyond year “ten” also still saw a sizeable number of cases. Cumulatively, 309 of the over 1400 cases represented in Figure 3.1 were in the year intervals 11 or

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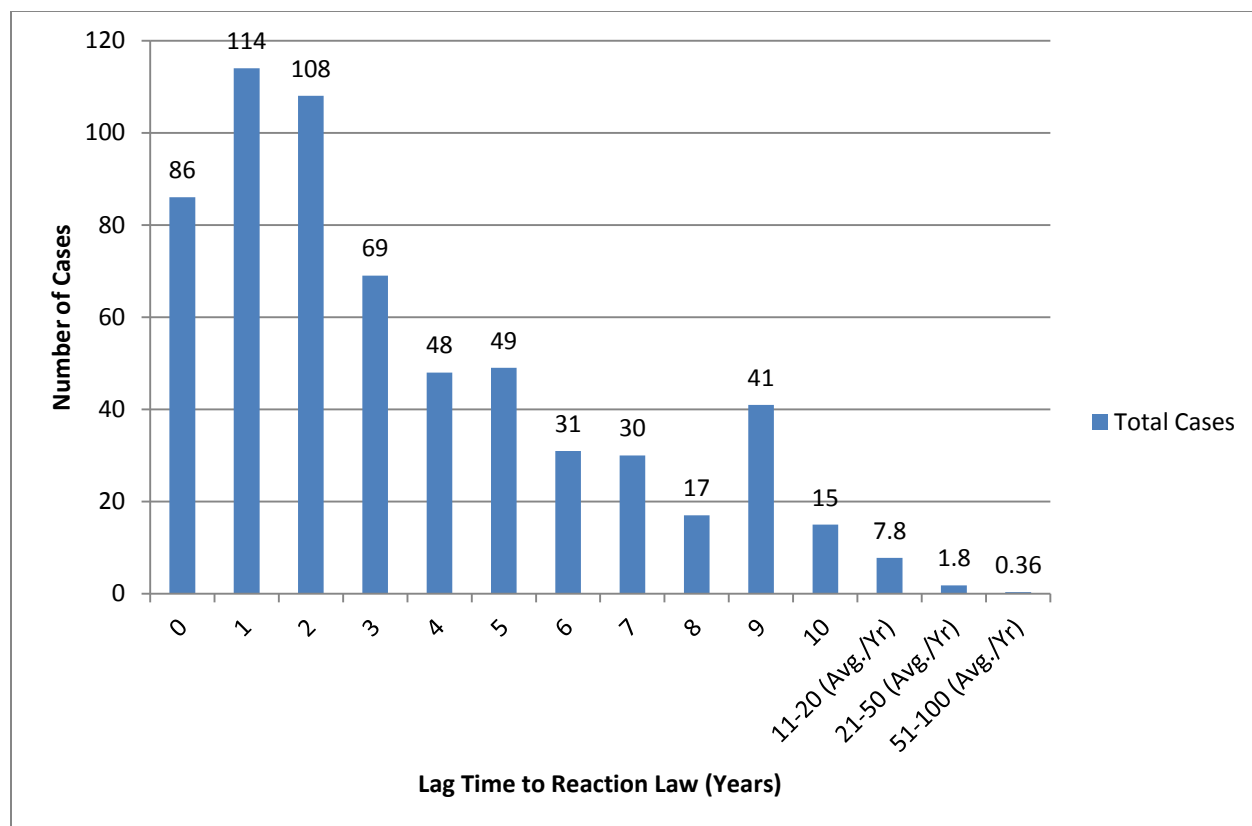
<sup>4</sup> I only coded a case as being responded to if the specific case is mentioned in the committee report attached to a particular bill. In a large number of situations, a more recent court decision prompted the attention of Congress and served as an important basis for the reaction bill. When reacting to the more recent case, it was not uncommon for Congress to also subsequently respond to earlier decisions by the same, or separate courts, covering the same general subject matter or statute that was at issue in the most recent decision that caused the congressional response. Thus, it is important to recognize that some of the older cases being responded to are only being reacted to because of a more recent decision that finally prompted Congressional attention and covered a similar subject area or statute as an earlier case.

higher, with 32 of the cases being 51 years or older. Likewise, 150 of the 758 cases in Figure 3.2, which includes only those cases that were reacted to in a new public law, fell into the intervals at 11 years or higher.



**Figure 3.2: Time Elapsed Between Court Decision and Reaction Bill (All Bills): 1967-2008**

Source: Compilation by author from analysis of the texts of U.S. House and Senate committee reports attached to legislation produced between 1967 and 2008. Case years, when not provided in committee reports, were located through a search of westlaw.com.

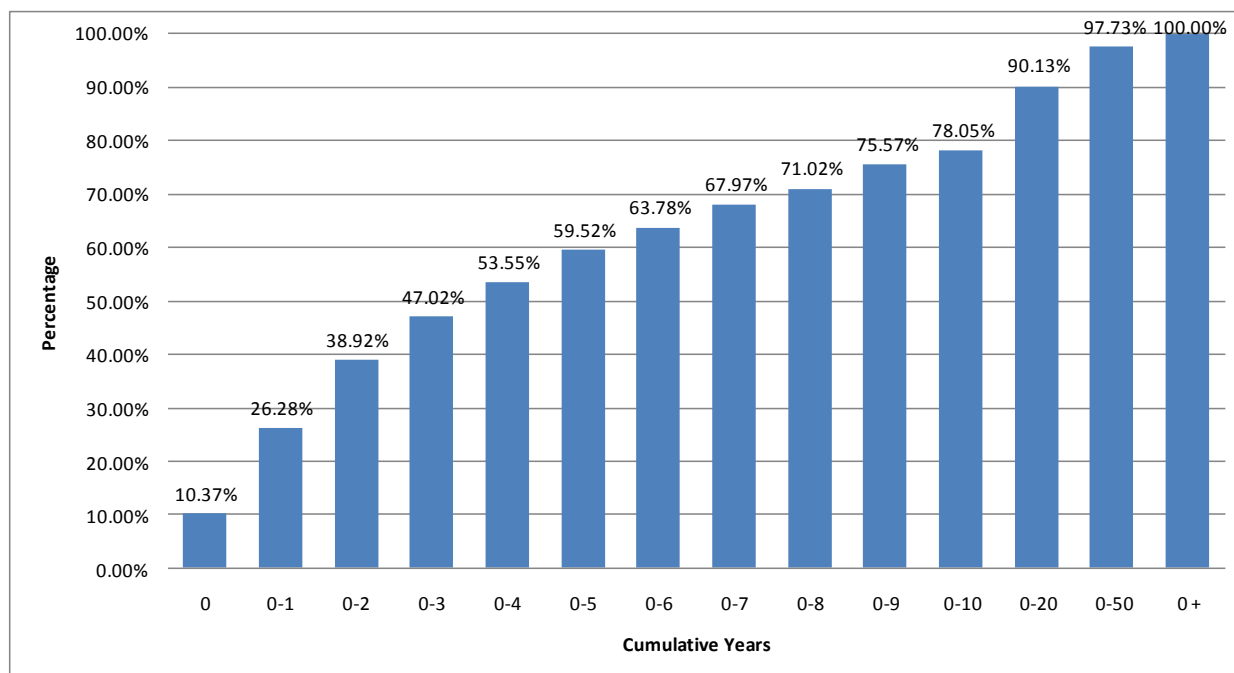


**Figure 3.3: Time Elapsed Between Court Decision and Reaction Bill (Public Laws): 1967-2008**

Source: Compilation by author from analysis of the texts of U.S. House and Senate committee reports attached to legislation produced between 1967 and 2008. Case years, when not provided in committee reports, were located through a search of westlaw.com.

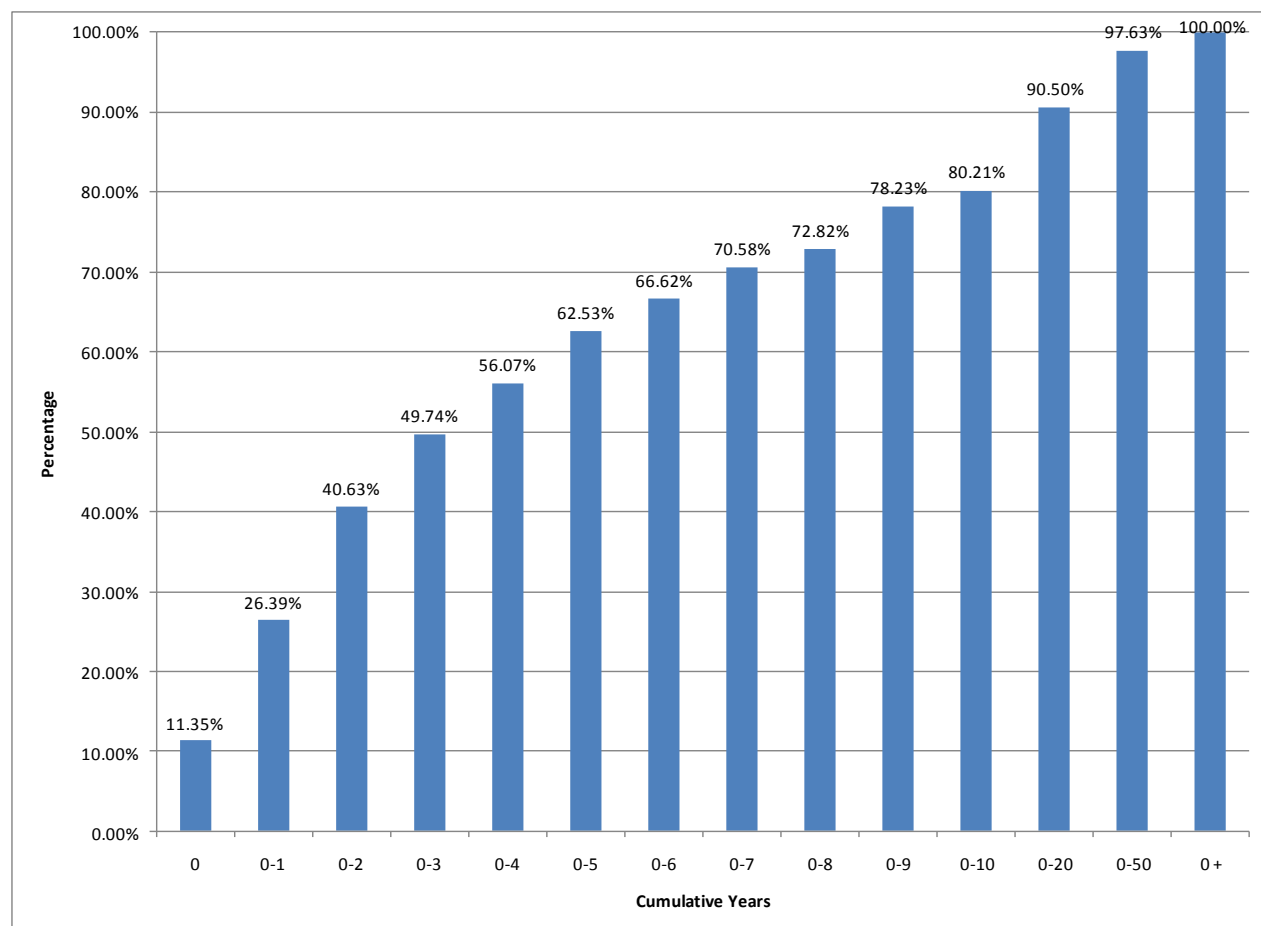
A separate measure for gauging the speed of the response time between the bill and the case is to examine the cumulative percentage of cases that are reacted to as each interval of time passes. In Figures 3.4 and 3.5, the percentage of the total number of cases responded to as each interval of time increases is presented. The results, consistent with the earlier analysis, demonstrate that the majority of cases, for all reaction bills and just those where the bills actually became law, are reacted to within five years of their issuance. In Figure 3.4, showing the total number of cases for all reaction bills, the 50% threshold figure is crossed between years “three” and “four.” The percentage of cases between zero and ten years that were subject to a reaction bill was approximately 78%. An analogous picture is presented in Figure 3.5, which shows the cumulative percentage of cases in years between the case and

the bill for only those bills that became law. For this set of cases, the 50% threshold is also crossed between years “three” and “four,” and just over 80% of the cases that are reacted to in new laws occurred ten years or earlier.



**Figure 3.4: Cumulative Percentage of Cases Reacted to by Year (All Bills): 1967-2008**

Source: Compilation by author from analysis of the texts of U.S. House and Senate committee reports attached to legislation produced between 1967 and 2008. Case years, when not provided in committee reports, were located through a search of westlaw.com.

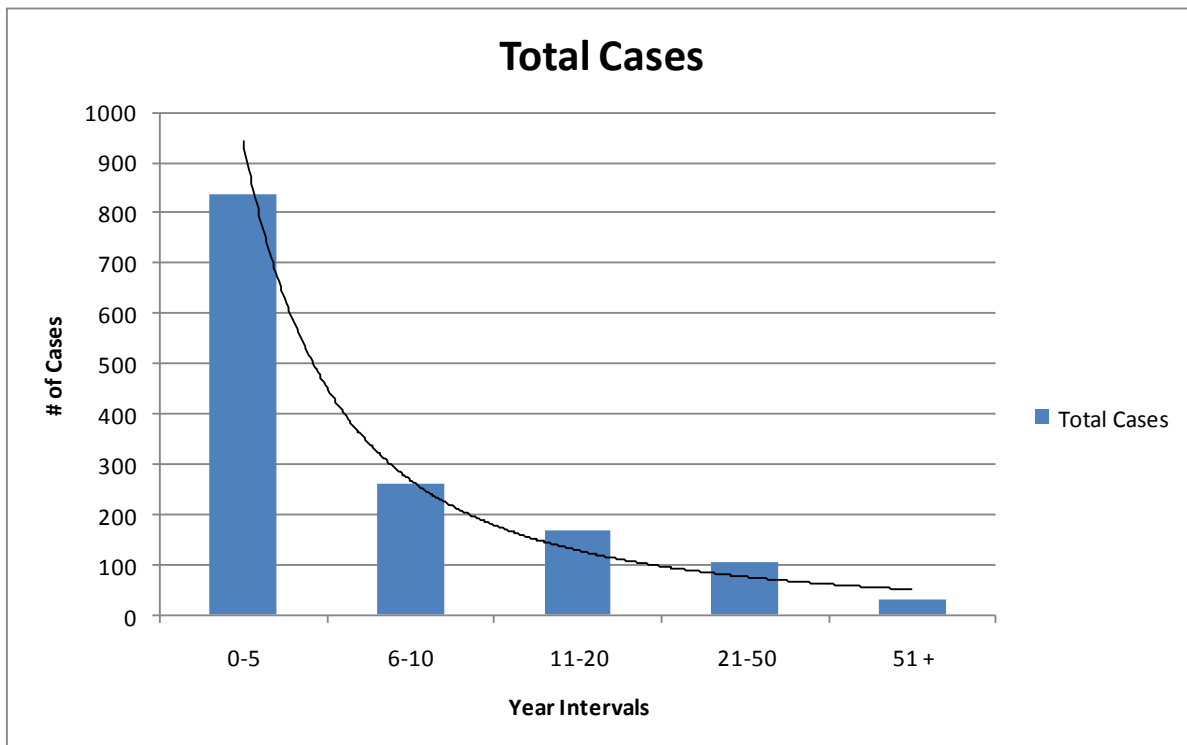


**Figure 3.5: Cumulative Percentage of Cases Reacted to by Year (Public Laws): 1967-2008**

Source: Compilation by author from analysis of the texts of U.S. House and Senate committee reports attached to legislation produced between 1967 and 2008. Case years, when not provided in committee reports, were located through a search of westlaw.com.

One of the main conclusions to draw from these results is that in a plurality of cases, Congress tends to act relatively quickly in initiating a legislative response to a court decision. Based on the results presented in both Figures 3.1 and 3.2, the response time peaks at the “one” year interval. Additionally, over 50% of the cases that are subject to a reaction bill or law have occurred within five years between the time the decision is issued to when the legislative response is initiated. Approximately eight out of ten of all cases reacted to in Congress occurred within ten years of when the decision was issued. Figure 3.6 confirms this analysis by graphing the cumulative number of cases at five different time intervals,

with the first interval being 0-5 years, then 6-10 years, 11-20 years, 21-50, and 50 + years, and imposing a trendline on the results. Over 800 of the cases fit within the 0-5 year interval, with a steep drop off in the next time interval of 6-10 and successively smaller drops thereafter. The slope of the trendline begins to level out following the 6-10 year interval, but it remains negative throughout the remaining year intervals. After a decision is a few years old, the probability that it will be subject to a reaction bill in Congress does begin to diminish significantly. These results are supportive of the conclusion that cases that are more recent, and in turn more likely to have been subject to recent news accounts or public scrutiny, have a greater chance of being scrutinized in a reaction bill than a case that is, for example, more than ten years old.



**Figure 3.6: Time Elapsed Between Court Decisions and Reaction Bills-- Trendline (All Bills): 1967-2008**

Source: Compilation by author from analysis of the texts of U.S. House and Senate committee reports attached to legislation produced between 1967 and 2008. Case years, when not provided in committee reports, were located through a search of westlaw.com.

Nonetheless, the results also support a complimentary conclusion that Congress remains willing to engage, and is aware of, cases that, for the most part, have long past moved out of the general public conscience. While the majority of cases that are subject to a congressional response are five years or younger, a still impressive amount, over 40% of the total cases, are 6 years or older, as presented in Figure 3.3. Over 10% of the cases in both Figures 3.1 and 3.2 fall within the 11 to 20 year interval. Even several dozen cases that are more than 50 years old were subject to reaction bills and laws.

While a definitive conclusion as to the process motivating these reaction bills in Congress cannot be drawn from these results in isolation, the overall analysis is suggestive of the fact that there may be multiple factors driving Congress in responding to certain court decisions. Even though the results confirm that cases that have been issued relatively recently have a greater chance of being subject to a congressional response, this same data also confirms that Congress continues to react to cases that, for the most part, have long since moved out of any recent news media accounts and, in some cases, are several decades old.

With the exception from a relatively few landmark decisions, primarily from the Supreme Court, most cases (among the small subset that receive any public attention to begin with) are generally forgotten among the mass public within a year or so of the time they are issued and certainly by five years or more. If Congress is reacting to cases that are much older than just a couple of years at any measurable rate, which this data confirms they are in fact doing, there is likely some other mechanism at work, beyond the saliency of the case itself, for explaining how Congress discovers these various cases and decides which cases to react to through reforming legislation. If there is going to be any public pressure on Congress to react to a court decision that pressure will likely come within a year or two of the decision being issued. Since a sizeable percentage of the cases that are subject to a reaction bill are

beyond even the five-year mark, explaining this behavior in Congress as solely one being generated by political pressure makes little sense.

This data also offers some important empirical support for the idea that the courts are justified in drawing the conclusion that a lack of congressional response likely means a decision is “good law” and should be followed in the future. As you will recall from Chapter 2, several passages from Supreme Court decisions were presented to show that the Court monitors how, if at all, Congress responds to their decisions and seems to derive meaning from the scope of that response. If, for example, the Supreme Court justifies a current decision by relying on a case issued 20 or 30 years prior, at least some of the Justices feel there is greater justification for such reliance knowing that Congress could have responded to that earlier decision but chose not to take any action. Measuring the lag period between the time these decisions are issued and when a congressional response is generated confirms this anecdotal belief among some of the Justices: older decisions, which have not been reacted to, have greater vitality and force as law.

It is more likely than not that if Congress is going to react to a case, it will do so within five years of its issuance. For the most part, after the first couple years the probability of a congressional response drops each year. Whether the reason for that is simply due to a collective forgetfulness on the part of Congress as decisions age or if it means that by not responding to a case Congress is implicitly giving it a general stamp of approval, it is clear that the older a decision gets the less likely it will be subject to a congressional response. The Justices then, it would appear, are indeed justified in finding higher levels of conviction in relying on decisions that are considerably older when making determinations over the case at hand. Nonetheless, this data shows that the specter of a congressional response remains a possibility even 50 or more years later.

Policy Arena



### Chapter 3: Congressional Behavior & Reaction Bills

In crafting legislation that is responsive to one or more court decisions, Congress has four options. It can amend an existing statute or set of statutes, it can develop a new statutory scheme, it can repeal a statute in its entirety, or it can propose a constitutional amendment. When the different committees in the House and Senate report on legislation, they are required to identify any changes or impacts that the new legislation would have on existing laws. As a result, in reading through the committee reports attached to reaction bills, I was able to record what existing statutes were being impacted by the portion of the bill reacting to a court case, or if there was no impact on an existing statute whether the reaction bill was proposed to create a new law or amend the Constitution. From this assembled data, I was then able to conduct an analysis of the various policy areas that are at issue in these bills.

An accounting of the different policy areas impacted by the reaction bills offers an important window into understanding the broader nature of the relationship between Congress and the federal courts and the interactions between these two branches in the lawmaking process. If certain types of statutes are regularly targeted in reaction bills while others receive little or no attention, such a result would reveal important information concerning congressional priorities and what policy areas are the subject of greater levels of dialog between Congress and the federal courts. Also, among public policy scholars, it is a now well-recognized principle, first articulated by Theodore Lowi, that “policy causes politics” (2009, 4). Thus, knowing something about the type of policies implicated in reaction bills is informative as to the political environment that surrounds the production of these bills. Finally, much of the past scholarship on reaction and override bills has been focused on the Supreme Court’s use of judicial review to strike down legislation and any corresponding response to the Court’s action in Congress. By differentiating between those bills that amend existing statutes and those that offer either a constitutional amendment or a new law, I am able to provide a more thorough assessment as to

whether the focus of past scholarship on just the Court's judicial review cases is reflective of the broader reaction bill process.

To determine what type of policy was implicated in each of the reaction bills, two separate pieces of data were recorded within the process of reviewing each of the identified committee reports attached to reaction bills. First, for those bills amending an existing statute, I recorded what provision in the United States Code was being impacted by the portion of the bill responding to a court case. If the bill was designed to amend the Constitution or create a new law, it was separately recorded as such. The U.S. Code provides a pre-determined system for grouping all of the statutes-at-large passed by the U.S. government based on their general subject matter. Using the subject headings for each Title of the U.S. Code, it is possible to present a general picture of the type of statutes most often implicated in the reaction bills. The United States Code has 49 distinct titles (labeled 1-50 with the omission of a Title 34) in addition to several distinct chapters addressing rules and procedures for the various federal courts, the rules of evidence, as well as bankruptcy rules and forms. Each title typically has dozens of distinct chapters and sections within it corresponding to the different acts passed by Congress over the years, but each chapter generally relates to the broader subject-matter of the Title. Thus, for instance, Title 29 titled "Labor," contains within it both the Fair Labor Standards Act of 1938 and the Family and Medical Leave Act of 1993. While they are distinct statutory schemes, they each touch on the various rules of the workplace that Congress has placed on most employers in the United States over the years.

Separately, relying on the policy typology first developed by Theodore Lowi, now referred to as the "Arenas of Power," I also classified whether the statute or set of statutes implicated by each bill fell within one or more of the four distinct categories developed within this policy taxonomy. The policy framework operates through the interaction of two distinct characteristics invariably present in the development of any public law: (1) the likelihood of government coercion (being either remote or

immediate); and (2) the means through which that coercion operates (either at the individual or environmental level). When these two variables (both operating at two distinct levels) are crossed, they produce these four distinct policy areas. Each of the four resulting categories has been given a distinct label, and they include the: (1) distributive; (2) redistributive; (3) regulatory; and (4) constituent categories. As Lowi then argues, each policy arena is associated with its own distinct brand of politics. The central point in the development these distinct policy types is the recognition of the fact that “each policy area incorporates its own characteristic political process, structure, elite, and group relations” (Spitzer 1983, 24).

Beginning with a review of how often the various titles within the U.S. Code are implicated in reaction bills, Table 3.8 contains an aggregate count of how often each of the Titles were subject to a reaction bill, as identified within the committee report.<sup>5</sup> Since any one reaction bill can respond to multiple court decisions, it was not uncommon for two or more different titles of the Code to be implicated within any one bill, resulting in a higher total number of titles implicated than actual reaction bills themselves. If the bill was designed to create a new statutory scheme, thus not amending an existing statute, it was recorded as being a “new law.” Likewise, if the bill was designed to amend the Constitution itself, it was recorded within the “Constitutional amendment” category. Table 3.8 is divided sequentially by title number and the name of that title, and the final number represents how many times that title was reacted to within a discrete reaction bill across the entire time frame of this study, from 1967 through 2008.

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<sup>5</sup> In each case, I actually recorded the specific section of the U.S. Code being impacted by the reaction bill. Given the thousands of different Acts currently in force, however, there was no effective way to present all the data on the discrete sections of the Code that were implicated. In those cases where multiple sections of a particular Title were subject to a reaction bill, they were recorded as just being one instance of that particular Title.

**Table 3.8: Amendments to U.S. Code in All Reaction Bills: 1967-2008**

Title Number & Description	Total Number of Bills
TITLE 42. THE PUBLIC HEALTH AND WELFARE	91
TITLE 26. INTERNAL REVENUE CODE	86
TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE	62
TITLE 18. CRIMES AND CRIMINAL PROCEDURE FEDERAL SENTENCING GUIDELINES FEDERAL RULES OF CRIMINAL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS	60
TITLE 15. COMMERCE AND TRADE	42
TITLE 29. LABOR	40
TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES	38
TITLE 38. VETERANS' BENEFITS UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS RULES OF PRACTICE AND PROCEDURE	28
TITLE 49. TRANSPORTATION	28
TITLE 25. INDIANS	25
TITLE 11. BANKRUPTCY RULES OFFICIAL AND PROCEDURAL BANKRUPTCY FORMS	22
TITLE 16. CONSERVATION	22
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS	20
TITLE 17. COPYRIGHTS	15
TITLE 35. PATENTS	12
TITLE 12. BANKS AND BANKING	11
TITLE 10. ARMED FORCES	10
TITLE 7. AGRICULTURE	9
TITLE 19. CUSTOMS DUTIES	9
TITLE 31. MONEY AND FINANCE	9
TITLE 21. FOOD AND DRUGS	8
TITLE 33. NAVIGATION AND NAVIGABLE WATERS	8
TITLE 8. ALIENS AND NATIONALITY	7
TITLE 20. EDUCATION	7
TITLE 50. WAR AND NATIONAL DEFENSE	7
TITLE 2. THE CONGRESS	5
TITLE 44. PUBLIC PRINTING AND DOCUMENTS	5
TITLE 46. SHIPPING	4
TITLE 1. GENERAL PROVISIONS	3
TITLE 30. MINERAL LANDS AND MINING	3
TITLE 41. PUBLIC CONTRACTS	3
TITLE 43. PUBLIC LANDS	3
TITLE 22. FOREIGN RELATIONS AND INTERCOURSE	2
TITLE 45. RAILROADS	2

**Note:** Titles 4, 9, 14, 23, 32, 36, 39, and 40 only had one amendment through reaction bills. Titles 3, 6, 13, 24, 27, 37, 48, and 50 had zero amendments through reaction bills. New laws were created in 65 instances that would be later added to a relevant title, and 17 of the reaction bills proposed Constitutional amendments. In 24 cases, the amendments were not linked with a specific Title of the U.S. Code in the Committee report.

**Source:** Compilation by author from analysis of the texts of U.S. House and Senate committee reports attached to legislation produced between 1967 and 2008.

The results, as described in Table 3.8, demonstrate that a relatively small percentage of the various titles within the U.S. Code receive the majority amount of attention within reaction bills. The top five titles of the U.S. Code most often subject to a reaction bill included: (1) Title 42, the Public

### Chapter 3: Congressional Behavior & Reaction Bills

Health and Welfare, at 91 responses; (2) Title 26, the Internal Revenue Code, at 86 responses; (3) Title 28, Judiciary and Judicial Procedure, with 62 responses; (4) Title 18, dealing with crimes, criminal procedure, and the federal sentencing guidelines, at 60 responses; and (5) Title 15, Commerce and Trade, with 42 responses. Some other Titles that also received considerable attention included Title 29, Labor, at 40 responses; Title 5, Government and Organization, with 38 responses; and Titles 38 and 49, dealing with Veterans' Affairs and Transportation respectively, both of which had 28 responses. The majority of the remaining titles were implicated in a dozen or less bills, with several of the titles never being subject to a reaction bills across this entire period of time. While the number of discrete Acts within the various titles subject to reaction bills is quite broad, this data confirms that reaction bills tend to be concentrated within a relatively small number of titles of the U.S. Code.

Title 42, which had the highest total number of responses, includes both a large number of Acts as well as statutes that cover a wide variety of topics. For example, this Title contains both the Social Security Act and the Civil Rights Act. These two Acts were, together, targeted in more than two dozen distinct instances within various reaction bills over the years. Tax policy, surprisingly, was the second most implicated category. The tax code, as a whole, is subject to major overhauls by Congress from time-to-time, but as this data makes clear, Congress is constantly making adjustments to the tax code in response to specific court decisions as well. Two areas of law directly implicating the power and authority of the federal courts themselves also receive a much higher than average level of attention in reaction bills. Title 28 concerns the jurisdiction of the federal courts and the procedures relied on by the courts in processing cases. While the jurisdiction of the Supreme Court is established within Article III of the Constitution, that same Article gives Congress the power to establish the lower court system and its jurisdictional authority. Given the frequency with which this Title is amended within the reaction bill process, it is reasonable to conclude that Congress is regularly adjusting the jurisdiction of those courts in response to specific cases emanating therefrom. Likewise, Title 18, which establishes federal crimes,

criminal procedure, and the federal sentencing guidelines, all of which are closely tied to the federal judiciary, is also regularly being amended in response to how the courts are interpreting sections within this Title in criminal cases.

Not surprisingly, the sections of the U.S. Code most often at issue in these reaction bills closely parallel those committees in the House and Senate that are most actively involved in this process and have jurisdiction over those same areas of policy. Recalling the discussion from the earlier section on committee activity, the Judiciary Committees in both the House and Senate were, by far, the most actively involved in producing reaction bills of any committee in either chamber. The Judiciary Committees in each chamber, among other areas, have jurisdiction over the federal courts, the procedures within the court system, and all federal criminal laws, each of which are regularly implicated in reaction bills. Two other committees among the top five of activity, the House Education and Workforce Committee and the Senate Committee on Health, Education, Labor, and Pensions, each have jurisdiction over at least part of the titles similarly organized, including both Title 42 on the Public Health and Welfare and Title 29 on Labor. Those committees are regularly making amendments to various acts like the Civil Rights Act, the Americans with Disabilities Act, the National Labor Relations Act, the Social Security Act, and the Family and Medical Leave Act, all of which are contained within these two Titles of the Code.

Not all reaction bills, however, involve amendments to current provisions of the U.S. Code. Some reaction bills are the beginning of legislative efforts within Congress to amend the U.S. Constitution. Since over the past 40 years, only two amendments to the Constitution have passed, almost all of the reaction bills seeking a constitutional amendment have failed. Nonetheless, one of the bills that resulted in the 26<sup>th</sup> Amendment to the Constitution was in response to the Supreme Court's

decision in *Oregon v. Mitchell*<sup>6</sup>, where the Court found that States had discretion in setting age limits for state elections. In total, there were 17 reaction bills that sought an amendment to the Constitution in response to a decision, which in each case, emanated from the Supreme Court. When a committee does draft a report to accompany a bill that has passed, it is required to specify any effects the new legislation may have on existing law. This is what permitted an identification of the specific title and section of the U.S. Code implicated by the reaction bill, but the absence of such identification by the committee was indicative of the fact that the bill would result in an entirely new law. In total, 65 of the bills were designed to create an entirely new statutory scheme, indicating that in response to court decisions Congress is not only amending existing laws but also creating entirely new ones as well. An example of this activity was provided earlier in Chapter 2 with the discussion of the congressional response to *Employment Division of Oregon v. Smith*,<sup>7</sup> and later *City of Boerne v. Flores*<sup>8</sup>. The issues raised in those two cases resulted in Congress adopting two completely new statutory schemes, initially the Religious Freedom Restoration Act, and once that was invalidated by the Supreme Court, the Religious Liberty Protection Act. Both of those statutory frameworks, while a direct response to decisions by the Supreme Court, did not exist prior to the time of these cases and the corresponding response by Congress.

The arenas of power developed by Lowi initially began as a critique of pluralism and its focus on the role of groups and elites in American policymaking. Pluralists, Lowi argued, all shared the “same fatal flaw: the assumption that government (the state) is an epiphenomenon of social forces” (Lowi 2009, 4). This assumption leads pluralists to conclude that the political process during any one time period or within any one environment causes distinct policies to be produced. Lowi discovered the opposite was true, and that, instead, “policy causes politics” (Lowi 2009, 4). The argument in support of

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<sup>6</sup> 400 U.S. 112, 91 S.Ct. 260, 27 L.Ed.2d 272 (1970).

<sup>7</sup> 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990).

<sup>8</sup> 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997).

this conclusion and observation involves three distinct axioms. As aptly summarized by Spitzer (1983, 22):

First... relationships among individuals are predicated upon the expectations of the participants; second, that expectations in the political realm are affected by governmental outputs or policies; and third, that political relationships are thus determined by the types of policies involved, so that each type of policy is likely to engender a different sort of politics or set of political relationships.

These arguments help support a scheme for classifying policies, and the associated political environment, that can be measured both across different sectors of the government and over time.

As noted earlier, this taxonomy results in four distinct types of policies. The first of these has been labeled as distributive. Distributive policies are categorized based on their ability to be “dispensed and disaggregated on a unit-by-unit basis” (Spitzer 1983, 24). Policies of this type are commonly referred to as “pork barrel” or “patronage” policies, and the politics associated with these policies is characterized by cooperation and logrolling arrangements, which makes political parties important to the process for purposes of generating various coalitions. The second type of policy, labeled as regulatory, like its distributive cousin, targets specific individuals and conduct. But, unlike the non-confrontational mode of distributive policies, regulatory policy uses the force of the state, through its power to sanction undesirable conduct, to manipulate citizen behavior. Interest group activity is at its highest in this arena as various groups coalesce in an effort to force certain norms on different types of individuals. Examples include criminal laws and regulations concerning health and food safety.

Redistributive policies make-up the third category, and while they also use the power of the state to force certain behaviors, the target of these policies, unlike regulatory policies, is on groups and classes of people. As such, these policies make distinctions among certain groups, like the poor and the wealthy, or between different ethnic groups. The politics associated herewith tend to focus on conflicts between groups that are generally better off and tend to be disadvantaged by these policies and those



less well off who stand to gain. Constituent policies, while not part of the original scheme, was added to recognize the broad range of policies focused on the function of government itself, which have been labeled the “rules of the game” (Spitzer 1983, 26). Political parties are closely involved in the development of these policies, as they directly affect the power dynamics of the different parties, but the federal judiciary also finds itself at the center in the development of policies of this type. Finally, the top levels of the executive and legislative branches are also closely involved in crafting these laws. While these policies often matter a great deal to political elites within the branches, they are often characterized by their lower visibility to the public. Examples include appropriation laws and agency or departmental reorganizations.

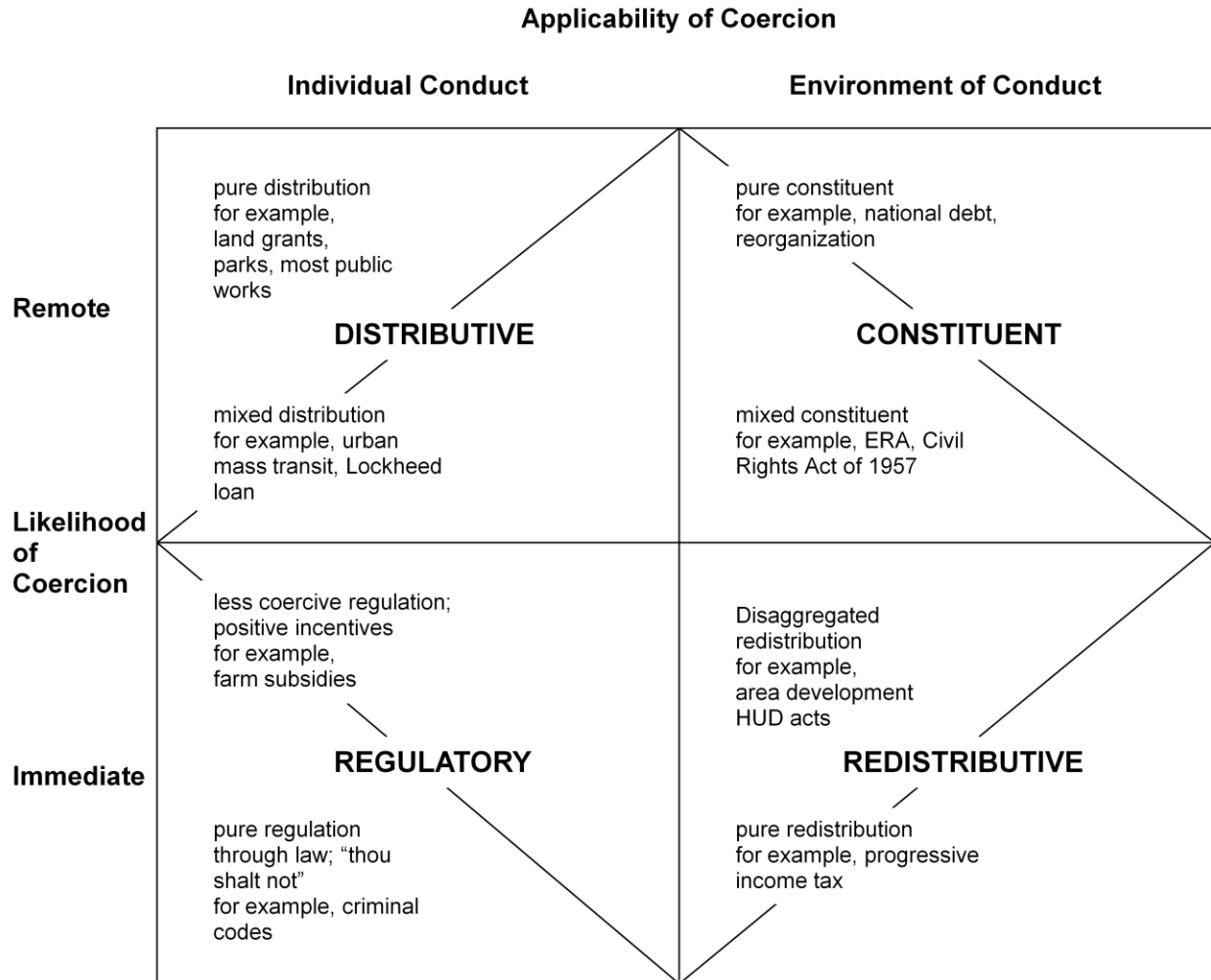
Across the many decades now since its development, the arenas-of-power scheme has been subject to numerous critiques and subsequent defenses by a range of scholars. The more conceptual critiques that have been lodged, I set aside for purposes of this project, as the scheme itself remains vibrant and relevant to this day.<sup>9</sup> Analytically, however, the scheme does present some problems that I must confront as they pertain directly to the classification of the policies at issue in these reaction bills. The most fundamental of these criticisms centers on the difficulties involved in operationalizing the various categories. Many types of policies appear to fit equally well in two or more categories, making the selection of any one category for purposes of placing a particular statute within seemingly arbitrary. Related to this critique is the argument that some policies have mixed characteristics across two policy arenas whereas others more squarely fall within discrete categories. The original scheme does not account for this blending and differentiation between the “purity” of different types of policies.

To account for these critiques, I follow an approach developed by Spitzer (1983) for coding and classifying different policies. As noted by Spitzer, while there is always some degree of ambiguity in

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<sup>9</sup> For a summary of some of the main conceptual critiques to Lowi’s scheme, see Spitzer 1983, 26-28.

classifying any one policy, “much of the confusion arises from ambiguity over selection and evaluation criteria” (1983, 28). To clear up this confusion, Spitzer developed a set of classification rules based on the distinct characteristics within each policy arena. The rules, defined by the distinct characteristics not only between statutes but also within statutes themselves, are framed by a description of what a particular bill is designed to accomplish with the corresponding policy type listed at the end of this description. A complete list of these coding and classification rules is provided in Appendix A. Also, to account for the fact that many statutes have mixed characteristics, I rely on Spitzer’s revised arenas-of-power scheme. Figure 3.7 is a graphic representation of the revised scheme, with each box being cut in half to form a diamond shape within the four policy boxes. The inner diamond represents those cases that are mixed in their composition, with a blend of two or more characteristics from the different boxes. The outer diamond, in contrast, represents the more pure cases under Lowi’s traditional scheme. With this revision, it allows for the fact that any one bill or statute may have characteristics of two or more policies. In classifying each of the statutes affected within the bills, I accounted for this fact by designating what policy arenas were present within each bill when a mixture of two or more policy arenas was appropriate.

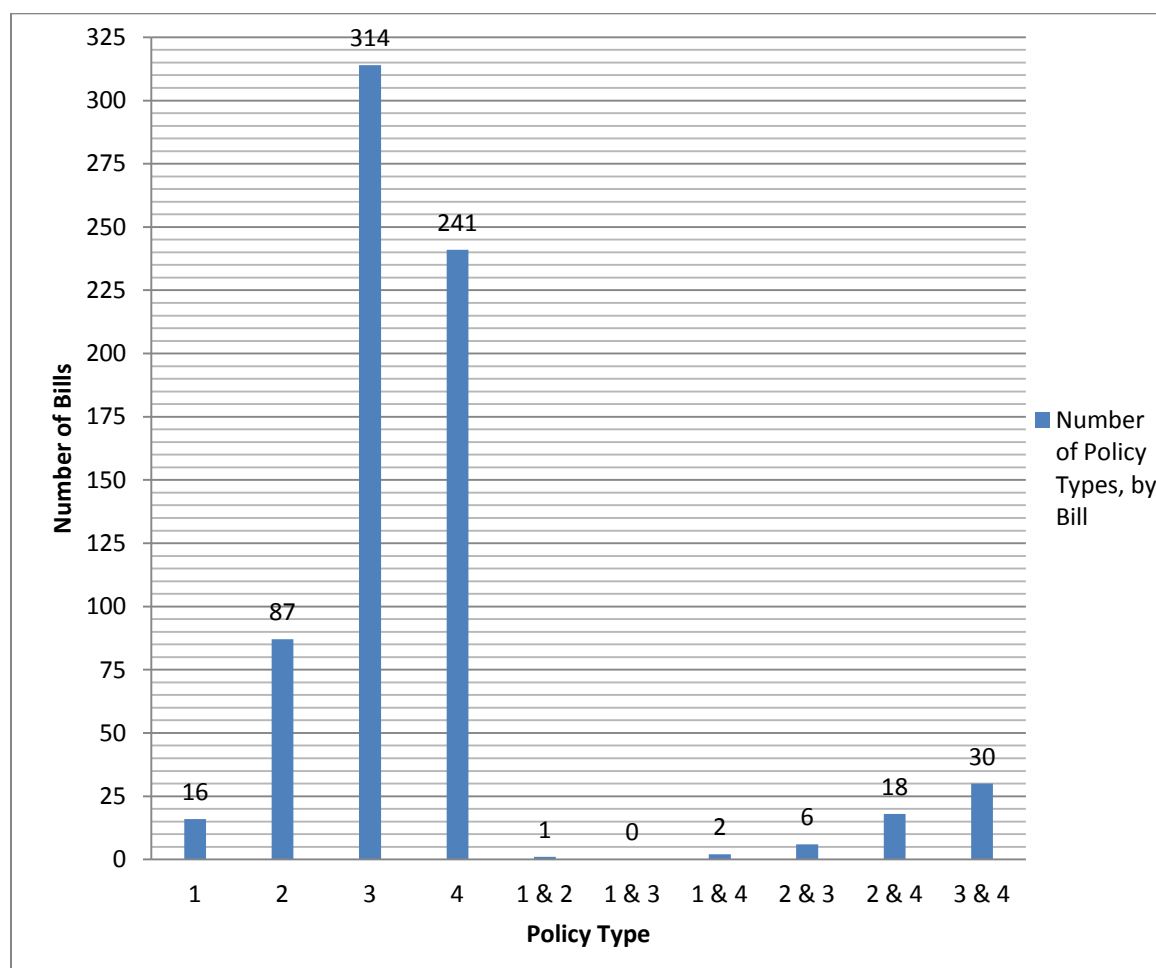


**Figure 3.7: Revised Arenas of Power\***

**\*Source: Spitzer (1983, 30)**

The results of the analysis on the different policy arenas addressed within the reaction bills are presented in Figure 3.8. Among the four “pure” categories, regulatory and constituent policies stand out far above the other two categories, with 314 and 241 bills, respectively, affecting statutes classified within either of these two categories. The number of bills containing redistributive policies is considerably lower at 87, but there are even fewer distributive policies, totaling only 16 of all the reaction bills. Within the “mixed” categories where a combination of two policy arenas was present within the statute at issue in the reaction bill, those statutes containing constituent elements within

them along with one of the other categories were most prevalent. In particular, the largest combination was between constituent and regulatory policies, with 30 instances of this combination, followed by constituent and redistributive policies, with 18 bills containing that combination. This data on the type of policies most prevalent in reaction bills is important because it is informative both as to the nature of policies most prevalent in reaction bills, and in addition it offers an important level of insight as to the politics associated with the reaction bill process.



**Figure 3.8: Policy Classification (Arenas of Power) of Reaction Bills**

Note: "1" = Distributive Policy; "2" = Redistributive Policy; "3" = Regulatory Policy; "4" = Constituent Policy

Source: Compilation by author from analysis of the texts of U.S. House and Senate committee reports attached to legislation produced between 1967 and 2008. Coding rules for classification of policies under the arenas of power scheme is drawn from Sptizer (1983, 32-33).

The most prevalent single category is regulatory policies. As noted earlier, regulatory policies involve topics like the federal criminal laws, antitrust and bankruptcy regulations, public health laws, and telecommunications regulations. Like redistributive policies, interest group activity tends to be the dominant *modus operandi* of politics associated with regulatory policies. The type of interest groups generally involved in the formation of regulatory policies tend to coalesce around single issues where like-minded individuals, passionate about one or two topics, come together in a group to lobby Congress. The close involvement of such groups also has a tendency to increase the amount of conflict, and the floor of Congress is usually where the battles over these policies are waged. The conflict between these groups and their representatives in Congress is typically mediated through a process of bargaining, as the competing groups make and receive concessions as policies of this nature are crafted.

A comparable number of constituent policies, when both the pure and mixed categories are combined, are present in these reaction bills as compared to the regulatory category. Policies within this category generally concern the function of government itself, and thus the politics are far less confrontational than regulatory policies and more cooperative as government officials work to administer the day-to-day operations of the federal government. Interestingly, of the four categories, the federal judiciary is most heavily involved in the politics associated with constituent policies. Since reaction bills represent congressional responses to decisions by the federal courts, it is not surprising that this is one of the largest categories. This category is also the most statist, as elite actors within the three branches as well as the political parties tend to dominate the discussion over these policies because they embody the “rules of the game” through which these actors enjoy, maintain, and potentially expand their influence. Inversely, the public and interest groups have little involvement here given the generally low visibility of these policies beyond the corridors of Washington, D.C.

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In contrast to the widespread prevalence of regulatory and constituent policies within reaction bills, a far more modest level of bills contain redistributive and distributive policies. In total, the two categories are found in about 15% of all the bills, but redistributive policies represent most of that total. The most common type of redistributive policy involves the income tax. Recalling the earlier discussion that identified Title 26 of the U.S. Code (the Income Tax) as the second most prevalent Title at issue in the reaction bills, this confirms that the redistributive policies most often affected by reaction bills involve the income tax code. Redistributive policies, like regulatory policies, engender a political environment dominated by interest groups, but the groups involved with these policies are typically multi-association groups representing a diverse number of interests, like the AARP or the Chamber of Commerce. As any conflict tends to become centralized around these few large groups, the political battles over redistributive policies generally move away from Congress to the Executive branch, where direction to changes in redistributive policies like Social Security or the Income Tax tend to originate. Logically, therefore, this serves as an important explanation as to why the number of redistributive policies is considerably lower than regulatory and constituent policies, as the development of this policy is generally not centered within Congress or the federal courts.

With less than two dozen, distributive policies make up the smallest category of reaction bills. This is readily explainable given what reaction bills generally represent. Distributive policies are more commonly referred to as “pork-barrel” and for good reason. Their purpose is to send federal dollars to discrete projects favored by members of Congress for their home districts. They deal with the allocation of funds and involve a political environment where members of Congress are effectively trading votes to win support for an appropriation of money back to a member’s district. Reaction bills, which by definition originate in response to a decision by one or more federal courts, largely do not concern how members of Congress choose to allocate funds. It is generally only when that allocation of funds is

challenged in court that a reaction bill may address a distributive policy, as Congress responds to the determination made by a court as to the validity of such a distribution.

Two interrelated, but distinct, pictures in terms of the political environment associated with reaction bills emerge from this analysis. First, interest group activity, conflict, and the act of bargaining, appear to be the most prevalent type of politics associated with the policies most often at issue in reaction bills. Both regulatory, and to a lesser extent redistributive policies, involve politics of this type within the arenas of power scheme. While that does not mean each individual bill exhibited such political characteristics, this does offer an overall picture of the political environment in play as reaction bills make their way through Congress. In contrast, the fact that there were a comparable number, albeit less, of constituent policies suggests that a very different political process is at work for many of the reaction bills as well. Constituent policies are the domain of elite political actors across all three branches of government as they seek to establish the rules by which these branches, and the distinct agencies within them, operate. The development of these policies tends to be far more accommodating and cooperative, as the political actors work to administer the large bureaucratic apparatuses of the federal government.

All of this speaks to the competing theoretical frames, at issue in this dissertation, for understanding how the branches work together in the lawmaking process. The prevalence of regulatory and redistributive policies lends support to the idea that conflict and contestation define the relationship between actors within, and across, the branches of government as well as the outside groups that seek to influence these discrete policies. This conflict is then mediated through the act of bargaining, as these actors trade and make concessions in order to maximize their policy preferences. Such a political environment is best explained through rational choice theory and its predictions concerning individual and institutional behavior of those involved.

In contrast, the large number of constituent policies present in reaction bills indicates an entirely different political environment. Conflict is not a feature of the politics associated with these policies and the relevant actors are members of the different branches, making for a far more statist focus. The prevalence of constituent policies within the broader reaction bill process, accepting my earlier argument as to the importance of this process for interbranch relations and lawmaking, is suggestive of a different framework for understanding how actors across the different branches interact. Constituent policies invoke behavior that results in a more conciliatory and cooperative type of politics, in comparison to regulatory policies. The data on the policy arena of different reaction bills cannot, alone, resolve any differences in theoretical perspectives of congressional behavior or interbranch relations. This data and analysis, however, does lend support to the idea that the behavior of members of congress is not unidimensional; rather, there may be mixed motivations at work that spawn very different modes of behavior.

#### Legislative Success Rate

The legislative reality for any bill that is introduced in Congress is that it will most likely fail to ever even emerge from committee, let alone turn into a public law. The primary reason for this phenomenon centers on the multiple veto points that any bill must clear as it moves through the legislative process. Before any bill can even receive a vote on the floor of the House or Senate, it must first pass through the committee that considers and develops the legislation, and, in some cases, one or more subcommittees as well. For the relatively few bills that emerge from the committee process, they then must be passed by votes of each of the two chambers in Congress, which in some cases must occur more than once if there are competing versions of the same legislation and reconciliation becomes necessary. The even smaller percentage of bills to make it through those floor votes must then face the President and the prerogative of that office to veto bills. It is, simply stated, a daunting task for any bill,



which explains why of the many thousands of bills that are introduced each legislative session, only a couple hundred actually become law.

This section traces the success rate of each reaction bill introduced in Congress between 1990 and 2008 as the supporters of each bill attempted to clear some of the major hurdles present in the legislative process.<sup>10</sup> Since each of the reaction bills located were attached to reports produced by the various committees in the House and Senate, by definition they each cleared one of the more significant hurdles for any bill, which is to be passed by the committee responsible for conducting hearings on the bill and marking it up for consideration by their respective chambers. Relying on the Congressional Record, which provides a comprehensive accounting of the history of each bill, a detailed recording as to whether each bill passed one or both chambers of Congress and for those bills passed by both chambers, whether or not they became public laws, is provided in this section. Examining the relative success rate of reaction bills as they work through the legislative process is important because it offers a different measure, building on a concept developed in Chapter 2, to gauge the overall significance of this type of legislation. Since most of the legislation introduced in Congress has little chance of ever emerging from committee (let alone receiving a floor vote or becoming a new law) if reaction bills succeed more often, this would be indicative of their overall importance to the greater legislative process. As a proxy for measuring how seriously Congress treats bills of this nature, I examine how often these bills passed one or more chambers or actually became law. If a relatively high percentage of these bills pass these critical veto points that would be indicative of the overall importance with which Congress, and the President, treat bills of this nature.

To understand the subtext for this argument, it is useful to begin with the question: why do the majority of bills introduced in Congress fail? Beginning with the initial observation that was first

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<sup>10</sup> The pre-1990 data derived from the analysis done by William Eskridge (1991) is not included in this analysis. This was due to the electronic availability of information in the Congressional Record documenting the legislative process for each bill that made searches for pre-1990 data more difficult.

succinctly stated by David Mayhew (1974), members of Congress (MCs) are fundamentally motivated in their behavior by the goal of reelection. One of the principal ways to ensure reelection is for MCs to convince their constituents that they have been working to advance their interests within Congress. While there are a variety of ways that MCs can achieve this goal, among the most obvious and perhaps most effective is to introduce or co-sponsor legislation that is targeted to help or satisfy the interests of that member's constituents. Certainly, shepherding any such bill through the entire legislative process so that it became law would be the most desirable outcome for any MC, but for various reasons, the act of just introducing legislation or co-sponsoring a bill can allow the MC to take credit for at least attempting to meet the interests of their constituents. As a result, many MCs "introduce bills they know will never see the light of day....because members wish either to be seen as policy innovators or to use the bill introduction process as a low-cost method of demonstrating that they are on top of popular issues" (Stewart 2001, 338). As noted by Stewart in this quote, introducing or co-sponsoring a bill represents a small cost for the MC with a large potential upside. On the other hand, pushing a bill through the various legislative veto points is a considerable amount of work and requires that MC to invest a good deal of their own political capital into what will likely be a failed effort with potential downside as various actors and groups work against passage of the legislation. As a result, most of the legislation any given MC introduces to be considered by Congress is done so with the knowledge that it will never actually become policy. Inversely, therefore, if certain types of legislation pass the various veto points in Congress and actually receive floor votes in each chamber, then this would represent a type of legislation that MCs treat more seriously and are actually interested in seeing become policy.

With that important caveat, Table 3.9 tallies the total number of reaction bills that emerge from committee to then either pass in floor votes from either, or both, chambers of Congress as well as those that actually become law. The data is divided by session of Congress, beginning with the second session of the 101<sup>st</sup> Congress (1990) and continuing through to the second session of the 110<sup>th</sup> Congress (2008).

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On average across this period, there were 29 reaction bills per session. Of that number, an average of just over 9 of the bills never received a vote by the floor of either the House or Senate, indicating that they died at some point after being reported on by the committee responsible for producing the bill. Typically this meant the bill was never scheduled for a floor vote or that it was voted on by one of the chambers but failed to secure enough votes to pass. The remainder of the bills, averaging slightly less than 20 bills per session, therefore, were voted on and passed at least one of the two chambers, which I define to mean “advanced legislative activity.” Among this remaining set of bills, just under eight on average passed in one chamber, nearly two on average passed in two chambers but progressed no further, and over ten bills on average cleared all the various veto points to become law. In total, therefore, approximately two-thirds of the reaction bills reported on by the various committees in the House and Senate received some form of advanced legislative activity, which at a minimum consisted of passing at least one chamber of Congress. Despite this variation in legislative success, the majority of reaction bills successfully navigated all the veto points to become a new public law.

**Table 3.9: Legislative Success Rate of Reaction Bills: 1990-2008**

Congressional Session	Year	No Vote	Passage: One Chamber*	Passage: Two Chambers**	Total: Two Chambers or Less***	New Public Laws	Some Legislative Activity^	Total Reaction Bills
110th-2nd	2008	11	9	1	10	7	17	28
110th-1st	2007	7	13	1	14	6	20	27
109th-2nd	2006	9	7	0	7	8	15	24
109th-1st	2005	8	8	1	9	16	25	33
108th-2nd	2004	13	8	1	9	5	14	27
108th-1st	2003	15	3	2	5	14	19	34
107th-2nd	2002	13	6	0	6	10	16	29
107th-1st	2001	4	6	1	7	8	15	19
106th-2nd	2000	11	7	0	7	8	15	26
106th-1st	1999	5	9	5	14	7	21	26
105th-2nd	1998	10	7	2	9	10	19	29
105th-1st	1997	11	6	1	7	14	21	32
104th-2nd	1996	11	3	0	3	16	19	30
104th-1st	1995	7	9	3	12	8	20	27
103rd-2nd	1994	14	9	1	10	12	22	36
103rd-1st	1993	3	6	0	6	12	18	21
102nd-2nd	1992	8	13	4	17	5	22	30
102nd-1st	1991	7	9	4	13	10	23	30
101st-2nd	1990	8	7	6	13	17	30	38
Total	1990-2008	175	145	33	178	193	371	546
Average/Session	1990-2008	9.21	7.63	1.74	9.37	10.16	19.53	28.74

Note: The column with the “\*” includes all reaction bills for each session of Congress that passed in either the House or Senate. The column with the “\*\*” includes all reaction bills that passed both the House and Senate but were either never presented to the President or were vetoed. The column with the “\*\*\*” combines the total from the prior two columns indicating passage in at least one chamber but no further legislative activity. The column with the “^” is a compilation of the prior two columns, tallying the combined product of bills that passed in at least one chamber and bills that became law. Source: Compilation by author from analysis of the texts of U.S. House and Senate committee reports attached to legislation produced between 1990 and 2008.

The percentage of all bills passing in at least one chamber of Congress fluctuated considerably between sessions. Table 3.10 details the number of reaction bills receiving some legislative activity as a percentage of all reaction bills introduced during each session of Congress. Applying the same formula, Table 3.11 presents only those reaction bills that actually became law as a percentage of all reaction bills

for each session.<sup>11</sup> Among those bills being passed in floor votes of at least one of the two chambers, the passage rate fluctuated from a low of nearly 52% during the second session of the 108<sup>th</sup> Congress to a high of over 85% during the first session of the 103<sup>rd</sup> Congress. On average over this 18 year period, 68% of all reaction bills were subject to some advanced legislative activity. While the percentage of all bills becoming law was obviously smaller, the results presented in Table 3.11 show even higher levels of fluctuation from session to session. During the second session of the 108<sup>th</sup> Congress, only approximately 18% of all reaction bills became law; whereas, during the first session of the 103<sup>rd</sup> Congress this figure stood at around 57% even though a comparable number of bills were considered in both sessions. This culminated in an average of 35% of all bills reported on by a committee during a particular legislative session becoming law.

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<sup>11</sup> The information presented is for the years 1990 through 2008 only. The percentages were derived from dividing the 7<sup>th</sup> column into the 9<sup>th</sup> column from Table 3.9.

**Table 3.10: Percentage of Reaction Bills Receiving Some Legislative Activity: 1990-2008**

<b>Congressional Session</b>	<b>Year</b>	<b>Percentage of Bills Receiving Some Legislative Activity</b>
110th-2nd	2008	60.7%
110th-1st	2007	74.1%
109th-2nd	2006	62.5%
109th-1st	2005	75.8%
108th-2nd	2004	51.9%
108th-1st	2003	55.9%
107th-2nd	2002	55.2%
107th-1st	2001	79%
106th-2nd	2000	57.7%
106th-1st	1999	80.8%
105th-2nd	1998	65.5%
105th-1st	1997	65.6%
104th-2nd	1996	63.3%
104th-1st	1995	74.1%
103rd-2nd	1994	61.1%
103rd-1st	1993	85.7%
102nd-2nd	1992	73.3%
102nd-1st	1991	76.7%
101st-2nd	1990	79%
Average Passage Rate	1990-2008	68.3%

Source: Compilation by author from analysis of the texts of U.S. House and Senate committee reports attached to legislation produced between 1990 and 2008.

**Table 3.11: Public Law Passage Rate: 1990-2008**

<b>Congressional Session</b>	<b>Year</b>	<b>Public Law Passage Rate</b>
110th-2nd	2008	25%
110th-1st	2007	22.2%
109th-2nd	2006	33.3%
109th-1st	2005	48.5%
108th-2nd	2004	18.5%
108th-1st	2003	41.2%
107th-2nd	2002	34.5%
107th-1st	2001	42.1%
106th-2nd	2000	30.8%
106th-1st	1999	26.9%
105th-2nd	1998	34.5%
105th-1st	1997	43.8%
104th-2nd	1996	53.3%
104th-1st	1995	29.6%
103rd-2nd	1994	33.3%
103rd-1st	1993	57.1%
102nd-2nd	1992	16.7%
102nd-1st	1991	33.3%
101st-2nd	1990	44.7%
Average Passage Rate	1990-2008	35.2%

Source: Compilation by author from analysis of the texts of U.S. House and Senate committee reports attached to legislation produced between 1990 and 2008.

One additional point of interest to emerge from this analysis is that while the absolute number of bills subject to advanced legislative activity varied between sessions, on a percentage basis, the first session of each Congress always had a higher passage rate in comparison to the second session. For instance, during the 110<sup>th</sup> Congress, the first session, as shown in Table 3.11, had a 74% passage rate while the second session was only at 61%. Likewise, during the 106<sup>th</sup> Congress, the first session measured at 81% whereas the second session came in at 58%. The same phenomenon did not occur among those bills that became law (for all sessions), as in three of the Congresses there was a higher percentage passage rate in the second versus the first session (see Figure 3.7). Nevertheless, a majority

of the Congresses generally saw a higher passage rate in the first as opposed to the second session when it came to the percentage of bills becoming law. Recalling the earlier discussion from Chapter 2, where it was noted that a majority of the time more reaction bills are produced in the second versus the first session, part of the explanation for the phenomenon here can be attributed to the fact that because there are generally more bills emerging from committee in the second sessions, the percentage that receive some legislative activity is predictably smaller. In other words, even if the same number of absolute bills passed in the second session, with a larger denominator of total bills, the percentage passage rate will necessarily drop.

There is no clear explanation for this repeated and consistent pattern in legislative success between sessions of Congress, but a number of possibilities present themselves. The political dynamics between sessions of Congress are clearly divergent. The first session of Congress immediately precedes either a midterm or presidential election year. The party to come into power, or remain there, after the election, likely views the results of the recent election as a mandate for its platform, and that party's members want to immediately seize on any momentum generated from the election to enact as much of their agenda as possible. In contrast, the second session of each Congress is an election year for all the members of the House and approximately one-third of the Senators. This is a time when most members of Congress are more acutely focused on their reelection prospects at the expense, perhaps, of a competing interest to advance a particular policy agenda. Separately, the internal dynamics of Congress may explain this divergence. Many of the pieces of legislation that have broad enough support to pass will likely achieve the requisite support within the first session. New legislation can, and certainly, is introduced in the second session, but a number of the bills considered in the second session will be holdovers from the first session and are more likely to be either controversial or simply lack widespread support. The passage rate, therefore, may naturally slip in the second sessions as all the "easy" bills are dealt with during the first session.



#### Political Environment of Reaction Bills

During the 1980s, political scientists, looking back over the American political environment during the past few decades, began to recognize that divided government, where Congress and the Presidency were simultaneously controlled by members of the opposite political parties, had become the archetype model in contemporary American political life. Support for this fact was only strengthened during this same time period, as from the 97<sup>th</sup> through the 102<sup>nd</sup> Congresses, a 12-year period, the American government remained continuously divided. The conventional wisdom was that the number of new policies produced during these eras of divided government would be less in comparison to earlier periods of unified government as a result of the enhanced levels of conflict and gridlock between the parties (Sundquist 1980; Ripley 1983; Cutler 1988; Smith 1988). The growing academic consensus around this conclusion, however, was impeded in 1991 when David Mayhew published his book, *Divided We Govern*. Perhaps the most striking conclusion from the book is that Mayhew found that the number of important legislative enactments produced during periods of unified versus divided government was largely indistinguishable. Subsequent scholarship helped to further strengthen this important conclusion as well as setting out a broader theory for understanding how and why the different branches, controlled by different political parties, can still work together to produce a consistent number of policies during both unified and divided eras of government (Krehbiel 1998; Cameron 2000).

Building off the totality of this scholarship, I now include the shifting political environment in Congress and the Presidency into the evaluation, as that environment also influences the number of reaction laws passed. Consistent with this earlier scholarship, one might expect that the absolute number of reaction bills may be less during periods of divided government since they not only must navigate the positions of members of Congress and the President but they also represent responses to

the Supreme Court and its policy views. Conversely, beginning with the line of literature first advanced by Mayhew (1991), the results of such an analysis may show little difference in terms of the number of reaction bills produced during periods of unified or divided government. By mapping the political environment in Congress and the Presidency on top of the number of reaction laws produced each congressional term, I can better evaluate these different hypotheses within the context of a specific political environment.

The results of this analysis are presented in Table 3.12, detailing which of the two parties controlled the House, Senate, and Presidency over time. The central conclusion to emerge from this analysis is that no clear pattern of variation emerges in terms of the number of reaction bills produced during periods of divided, as opposed to unified, government. The vast majority of the time between 1967 and 2008 the government was divided, meaning that either the two chambers of Congress were controlled by opposite parties or that Congress as a whole was controlled by one party and the President was controlled by another party. Specifically, during 30 of the 42 years in this study, the government was divided in some form with only 12 years of unified government. While divided government was more of the norm, there is no clearly identifiable distinction between the number of reaction bills produced during eras of divided versus unified government. On average across this entire period, there were 18 reaction laws per term of Congress. Among the six separate terms of Congress where the government was unified, four of them witnessed an above average number of reaction laws. Nevertheless, on an absolute basis, the two terms of Congress with the most reaction laws produced occurred during periods of divided government. Five of the terms were tied in third place for most number of reaction bills, with 24 new reaction laws in each term, and of those five terms, three of them occurred during periods of divided government.

### Chapter 3: Congressional Behavior & Reaction Bills

What is even more revealing with regards to the number of reaction bills produced is whether or not Congress itself was unified between chambers. A divided Congress only existed in four of the terms across the time frame of this study, and of those four, three of them saw an absolute number of reaction laws at or below the average for all of the terms combined. Since a division within Congress did not occur too frequently during this 42-year period, it is difficult to draw any definitive conclusions from this fact, but it does offer some mild support for the idea that a divided Congress has a greater impact on the number of reaction laws produced than does divided government as a whole.

**Table 3.12: Political Environment in Congress and Presidency: 1967-2008**

Congress	Year	Total Reaction Bills to PL	House Majority Party	House Majority Size	Senate Majority Party	Senate Majority Size	Divided Congress	President Party	Divided Government
110	(2007-2008)	13	D	233	D	51	N	R	Y
109	(2005-2006)	24	R	232	R	55	N	R	N
108	(2003-2004)	19	R	229	R	51	N	R	N
107	(2001-2002)	18	R	221	D	50^	Y	R	Y
106	(1999-2000)	15	R	223	R	55	N	D	Y
105	(1997-1998)	24	R	228	R	55	N	D	Y
104	(1995-1996)	24	R	230	R	52	N	D	Y
103	(1993-1994)	24	D	258	D	57	N	D	N
102	(1991-1992)	15	D	267	D	56	N	R	Y
101	(1989-1990)	24	D	260	D	55	N	R	Y
100	(1987-1988)	25	D	258	D	55	N	R	Y
99	(1985-1986)	26	D	253	R	53	Y	R	Y
98	(1983-1984)	17	D	269	R	54	Y	R	Y
97	(1981-1982)	18	D	242	R	53	Y	R	Y
96	(1979-1980)	22	D	277	D	58	N	D	N
95	(1977-1978)	16	D	292	D	61	N	D	N
94	(1975-1976)	19	D	291	D	60	N	R	Y
93	(1973-1974)	10	D	242	D	56	N	R	Y
92	(1971-1972)	5	D	255	D	54	N	R	Y
91	(1969-1970)	8	D	243	D	57	N	R	Y
90	(1967-1968)	13	D	247	D	64	N	D	N
Average		18		250		55			

Note: ^One independent Senator who caucused with Senate Democrats to provide them with the majority. "R" denotes Republican Party. "D" denotes Democratic Party.

Source: House information from the Office of the Clerk of the United States House of Representatives, Party Divisions of the U.S. House, located at: [http://artandhistory.house.gov/house\\_history/partyDiv.aspx](http://artandhistory.house.gov/house_history/partyDiv.aspx). Senate information from U.S. Senate history website, Party Divisions, located at: [http://www.senate.gov/pagelayout/history/one\\_item\\_and\\_teasers/partydiv.htm](http://www.senate.gov/pagelayout/history/one_item_and_teasers/partydiv.htm).

On a related note, the party in the majority within either chamber of Congress, or the Presidency, as well as the size of the majority control in Congress, appear to have little relation to the number of reaction bills produced. As detailed in Table 3.12, Democrats, particularly within the House, dominated control of Congress over this 42-year period, while Republicans generally dominated control of the Presidency during this same time. However, each party had an opportunity to control both chambers of Congress and the Presidency for several blocks of time. While there was a measurable level of variation in which party controlled these branches, this does not appear to correlate with the number of reaction laws produced. Among the seven distinct terms of Congress that produced the highest number of reaction bills, three of them occurred when Democrats controlled Congress, three took place when Republicans were in control, and one occurred when Democrats controlled the House and Republicans controlled the Senate. Likewise, among these same seven most-active Congresses, Republicans controlled the White House in four of the terms and a Democrat was President in three of the cases. In sum, Republicans and Democrats appear to be somewhat equally invested in the production of reaction bills

There were similar results with respect to the absolute size of the majority party in control of the House or Senate, indicating little correlation between the size of the majority's control and the number of reactions laws generated. The number of members of the majority party in each chamber for every term of Congress between the 90<sup>th</sup> and 110<sup>th</sup> is detailed in Table 3.12. To achieve a majority in the House, one party needs to hold at least 218 seats, while in the Senate that number stands at 51.<sup>12</sup> On average across these 21 distinct terms of Congress, the majority party (whether Democrats or Republicans) held 250 seats in the House and 55 seats in the Senate. Among the five terms of Congress

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<sup>12</sup> This assumes all seats are held by a member of either the Democratic or Republican parties. In some instances, members of Congress will not identify with either party and classify themselves as Independents, which in turn affects the number required to hold the majority. This occurred during the 107<sup>th</sup> Congress when Senator Jeffords of Vermont switched his party affiliation from Republican to Independent near the outset of this Congress. This had the effect of giving Democrats the majority in Congress, even though they only controlled 50 seats, as Senators Jeffords decided to caucus with the Democrats.

when the majority control of the House was at its highest level, three of those terms saw a below average number of reactions laws produced. In the Senate, during two of the five terms where the majority had its highest levels, there was a below average number of bills produced. Measured slightly differently, between the seven terms of Congress that saw the highest absolute number of reaction bills, in four of the seven terms at least one of the two chambers held a majority of the seats at a level at or below the overall average of the majority party's control during this time span. Put simply, during times when the majority/minority differential in seats was relatively small Congress still produced a high level of reaction laws.

In review, the data and analysis presented in this section has explored the political environment in Congress and the Presidency, through a variety of measures, and mapped that reality onto the total number of reaction bills introduced across this same time period. In operationalizing this political environment, I have classified each congressional term as existing during a time of divided or unified government, recorded which of the two main political parties was in control of both chambers of Congress and the Presidency, and the overall size of the majority's control in each chamber of Congress during each term. What each of these political measures revealed (both individually and collectively) is that there was little, if any, correlation between the volume of reaction laws passed and the discrete or aggregate political environment within Congress and the Presidency. In fact, the number of reaction laws remained relatively constant despite, as this analysis clearly documents, some regular and substantial fluctuations in the political landscape within both Congress and the Presidency over this 42-year period.

These findings add yet another general layer of analysis to understanding the environment in which reaction bills are created and advanced through the legislative process. More specifically, the results undermine any attempt to directly and exclusively link the production of this type of legislation

with the broader political environment in Congress or the Presidency. The volume of reaction bills produced appears to be unaffected by ebbs and flows of what party controls either of these branches of government or when the government is divided between the parties. The results also confirm Mayhew's broader finding in *Divided We Govern* (1991) that periods of divided government engender just as much legislative activity as is the case during periods of unified government, which appears to hold true even when focusing on the particular category of reaction bills. This suggests the possibility that the more raw political goals of members of Congress may not be the driving force behind the production of reaction bills since the number of bills does not fluctuate when one party takes control of either branch or depending on the size of the majority party's control of the House or Senate. This general finding supports the notion that the primary force affecting the implementation of reaction bills is primarily the domain of the interplay between the branches rather than external forces.

#### *Reaction Bills: A Typology of Congressional Responses*

Among those scholars studying the behavior of members of Congress, that same behavior among actors of the other two branches, and the interaction between these branches in the broader lawmaking process, the overwhelming conclusion (relying on rational choice theory) is that the policies produced through these interactions are born out of conflict and an effort by members of each of these branches to give effect to their pre-determined policy preferences. Thus, governance in the American system of separated powers, and the manner by which laws are produced, is the direct product of this back-and-forth conflict between the branches that is mediated through a mechanism Cameron refers to as "interbranch bargaining" (2000, 3). In turn, the subset of scholars within this genre who have sought answers to a similar question posed in this dissertation—why Congress responds to certain court decisions—have relied on many of the same assumptions, produced from rational choice theory, and focused on the conflict-based aspect of the relationship between Congress and the federal courts.

While relying on a variety of methodological approaches, the unifying focus within this line of literature is on instances where Congress seeks to *override* the courts. Within this context, and relying on the assumption that the various actors within these two branches are competing over pre-determined policy preferences, much of this scholarship has concluded that Congress produces override legislation in those instances where most of its membership agree that the decision was wrongly decided and there is an opportunity to give effect to their own policy preferences.

The problem with the approach and conclusions of much of this scholarship is that it fails to account for two key interrelated points regarding the interactions between these two branches and the broader policymaking environment. First, as persuasively stated by Ripley and Franklin, while much of this literature “focuses on the conflictual aspects of the relationship because conflict is a more exciting topic than cooperation....the bulk of policymaking is based on cooperation” (1980, 14). By focusing only on interactions involving conflict, in this case instances where Congress is trying to *override* the courts, this literature ignores those cases of more cooperative behavior where the members of these two branches may be working together to achieve a common goal. By ignoring or discounting the existence of other motivating factors driving the relationship between these branches, it undermines any attempt to develop a broader explanation as to why Congress may react to a court decision or any theory concerning the broader lawmaking process. Second, in focusing exclusively on overrides, this fails to account for “substantive variations in legislative responses” where, for example, a reaction bill may modify an existing statute to accommodate at least some of the “preferences of both institutions” (Pickerill 2004, 34-35). Congress can respond to a court decision in a variety of forms, ranging from an attempt to overturn the decision to accepting the determination made by the court and codifying that decision in a statute. If all of these types of responses are not taken into account, any explanation as to why Congress reacts to a court case is by definition incomplete.

For these two reasons, I concur with the argument first advanced by Pickerill that “it is difficult to explain congressional responses to [court decisions] *solely* as a battle over *a priori* and unidimensional policy preferences where either judicial supremacy reigns and the Court wins, or Congress overrides or challenges Court decisions in an exercise of coordinate construction and Congress wins” (2004, 37). To support such a conclusion, however, it is necessary to have a proper accounting of the type of responses from Congress to court decisions, which is an empirical question that has still not been properly accounted for in the literature. Pickerill (2004) attempts this very endeavor by developing a data set of all judicial review decisions by the Supreme Court between the 1954 and 1996 terms where the Court struck down a piece of legislation for violating the Constitution. This methodological approach only produced seventy-four observations, however, across this entire time span. For the reasons discussed earlier in Chapter 2, however, this approach misses a wide swath of instances where Congress is reacting to one or more court decisions. With my dataset of 733 different reaction bills between 1967 and 2008, a more complete accounting of all reaction bills is documented in order to present a more complete picture as to the nature of congressional responses to court decisions.

For each reaction bill located, I coded the nature of the responses based on one of three categories.<sup>13</sup> The first category was labeled “override/overrule.” If any section of a bill, or the bill in total, was designed to overturn a court decision through the amendment of an existing statute or by creating a new statute, the bill, or a portion of it, was placed into this category. The “override/overrule”

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<sup>13</sup> While the majority of reaction bills only have one of the three designations, many of them have two or three designations, and as such, there are more categories of bills than there are actual bills themselves. This is because any given bill may be responsive to two or more court decisions, and the Congressional reaction to those distinct cases can vary, even within the same bill. At least in the modern context, one piece of legislation rarely attempts to only accomplish one narrow task. Contemporary bills often have multiple goals and deal with a multitude of statutes all within the same bill. For example, part of the bill could be an attempt to override a decision from the 10<sup>th</sup> Circuit Court of Appeals whereas another bill could seek to codify a decision by the Supreme Court. In that case, the section of the bill seeking to reverse the 10<sup>th</sup> Circuit case was coded as an “override” instance and the section of the bill adopting some portion of a Supreme Court decision into a new or existing statute is placed into the “codify” category. If any of the categories had more than one case within them, which did occur regularly, all of the cases were counted as only one instance of whichever of the three categories they fell within. Thus, any one bill could have up to a maximum of three categories of cases within this accounting typology.



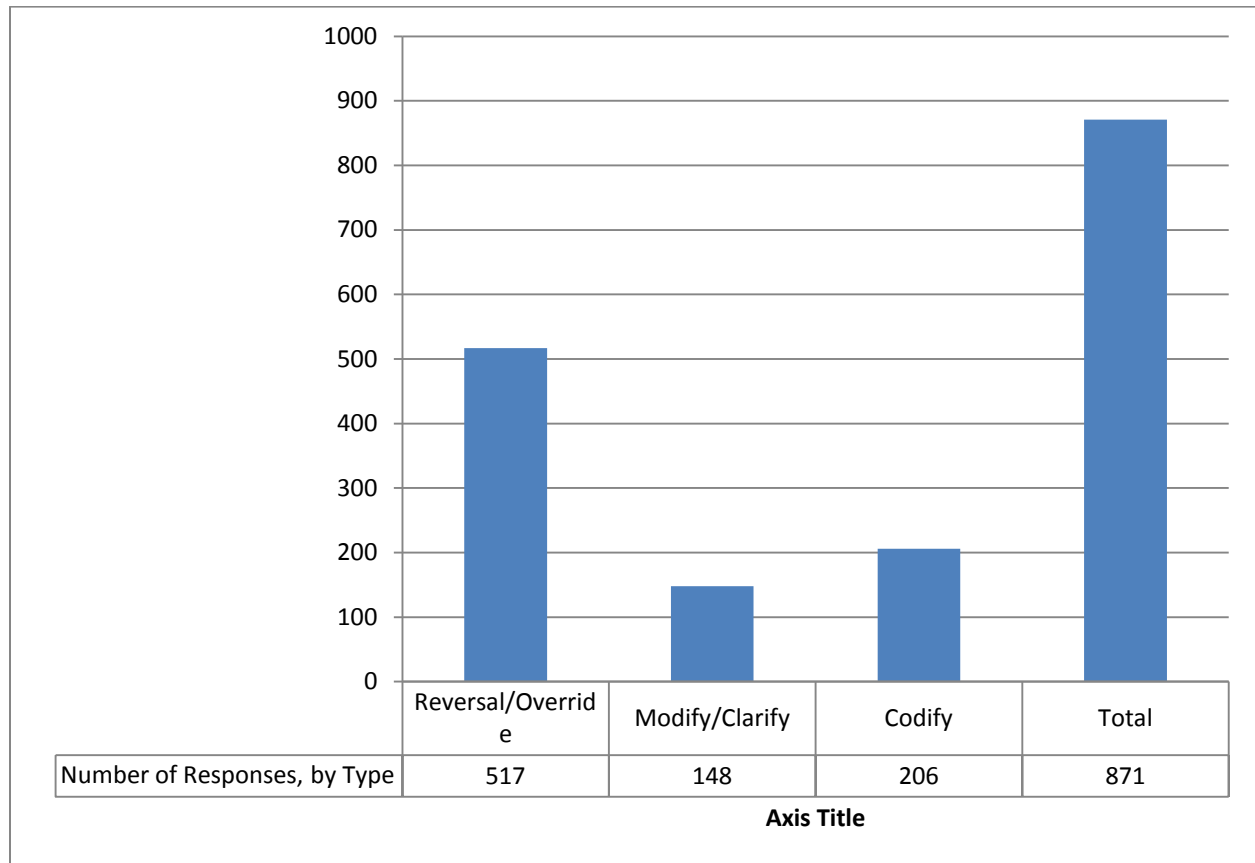
category was designed to focus on those instances in which there was a clear conflict between the preferences of Congress and those of the particular court that had issued the decision. The second category was labeled “modify/clarify.” The purpose of this category was to capture those instances where Congress was amending an existing statute or creating a new statute that had the effect of modifying the impact of a court decision or clarifying its scope but not explicitly overruling that decision. The main difference between this category and the first is the absence of a clearly stated or expressed conflict between the branches as denoted in the committee report. The final category was labeled “codify.” For those reaction bills that sought to adopt or codify an interpretation given to a statute by the courts, they were placed within this category. So, for instance, when the court interprets a particular term or phrase in an existing statute to have a particular meaning and Congress amends that same statute to adopt that meaning in a substantially similar form, then that bill, or the relevant portion of the bill, would be placed in the “codify” category. A complete description of the coding rules for these three categories is provided in Appendix B.

Figure 3.9 displays a tabulation of the three different categories of response type that the various bills, or sections thereof, were placed into based on the above-described coding scheme. More often than not, Congress was working to override or reverse one or more court decisions, making the “override/overrule” category the largest of the three. Of the 871 total distinct types of reactions across all the bills in the dataset, 517 of these instances involved an effort to override at least one court decision. Nevertheless, among the remaining two categories where there is, by definition of the category, an absence of any explicit conflict, and in many cases a stated agreement, with one or more court cases, there are a sizeable number of instances of this type of interaction. One hundred forty-eight of the bills, in total or in part, were efforts by Congress to modify or clarify at least one court decision. An even higher number of instances occurred, standing at 206, when Congress sought to codify or adopt some language from the decision into a new or existing statute. In combination, these

latter two categories accounted for 40% of all the instances among these three categories, a fraction missed if one only looks at reaction bills solely as a means to override a court decision.

This data confirms two important points from the previous literature. First, at least within the context of reaction bills, the majority of Congress's behavior is indeed based on some form of disagreement, as the members of Congress negatively react to a decision or set of decisions by the courts and work to overturn those cases. This point would seem to confirm much of the focus in this literature on Congress's override efforts, and it is suggestive of the fact that assumptions powering rational choice theory are realistic and help explain the nature of the relationship between Congress and the federal courts. However, the data also confirms the point first made by Pickerill that there are "substantive variations in legislative responses" (2004, 34). Around 40% of the time Congress is reacting to a court decision that response is not generated from an outright conflict between the branches, and in nearly 25% of the time there is an explicit agreement between the branches on the meaning and direction of a particular policy as Congress seeks to memorialize that agreement by creating a new statute or amending an existing one. This data, therefore, while confirming that a bare majority of interactions between Congress and the federal courts, at least in the arena of legislative responses, is grounded in some degree of conflict, in a substantial minority of these interactions that conflict is muted and in many cases replaced with a more cooperative spirit.

**Figure 3.9: Action Type of Reaction Bills: 1967-2008**



**Note:** The category descriptions and coding rules are provided in detail in Appendix B.

**Source:** Compilation by author from analysis of the texts of U.S. House and Senate committee reports attached to legislation produced between 1967 and 2008.

#### Judicial and Executive Signals

One of the important subtexts of this chapter, and central to the dissertation as a whole, is whether the behavior of various actors in the different branches of government in the context of lawmaking can be understood as more cooperative than is widely understood, as opposed to the traditional understanding that assumes conflict defines these interactions. If lawmaking is indeed iterative and perpetual as laws are crafted, interpreted, and modified by each of the three branches and there is some cooperative effort in that process, one would expect some degree of communication between the branches in this process. In fact, scholars focused on legislative-judicial relations have found some evidence that the Supreme Court in particular, when writing its decisions, includes

particular invitations or other cues to Congress regarding concerns or thoughts the Court may have about the case or the underlying statute at issue therein (Hausseger and Baum 1999). Likewise, among those to study the relationship between Congress and the federal bureaucracy, there has long been a recognition and accounting of the fact that there is an interdependency between Congress and the federal bureaucracy that regularly involves an exchange of information and support concerning the interpretation and implementation of laws passed by Congress (Arnold 1980).

In this section, I further the evaluation by examining whether Congress, in the context of producing reaction bills, elicits or looks to different cues or opinions about a particular statute or set of statutes offered by both the courts and the different federal agencies responsible for administering those particular statutes. In other words, when crafting reaction bills, is there any evidence that Congress relies on the views of the other branches? If, in fact, there is evidence of such interbranch communication, this opens an avenue of inquiry into considering the broader question of Part III of this dissertation, which asks why Congress may decide to react to particular court decisions while leaving the vast majority untouched. In looking into this question, I again rely on the detail provided in the committee reports, which were themselves the source of identifying whether a bill was responding to one or more court decisions. Among other things, the committee reports often detail the history of the particular piece of legislation being considered and the reasons why the majority of the committee believes the legislation should be passed. If there was any evidence of communication between the branches in the production of these reaction bills, the reports, logically, would be an important source of information for evidence of this fact.

Building off a concept most fully developed and articulated by Hausseger and Baum (1999), scholars have become increasingly aware that the Supreme Court, when drafting either majority, concurring, or dissenting opinions, will regularly signal Congress and invite a response to the decision.

### Chapter 3: Congressional Behavior & Reaction Bills

The concept of judicial invitations and signals will be explored in depth in Chapter 4, but for the present purposes it was important to ascertain if Congress cued into any of these signals coming from the federal bench when crafting reaction bills. To make this determination, when reviewing the committee reports attached to bills previously identified as reaction bills, I recorded whether or not the report: (a) referenced a passage from the decision that was at issue in the reaction bills; and (b) if the cited passage contained an invitation or signal from the particular court to Congress that some type of legislative response would be in order. If the committee report contained language satisfying both of these criteria, the reaction bill was coded as having a “judicial signal.” Information on whether or not the reaction bill contained any judicial signals was recorded for all bills across the entire data set.

Simultaneously, I also examined the level, if any, of agency contact with Congress regarding reaction bills. The committee reports always detail who gave any testimony in favor or opposition to a bill being considered by that committee, along with what agency or organization that individual represented. Additionally, the reports often include within them the official reports or letters from other federal agencies that wish to comment on the bill under consideration. With this information in the committee reports, I was able to first record whether or not a federal agency, such as the Justice Department or the Environmental Protection Agency, provided some level of testimony on each of the reaction bills, whether that testimony was given verbally during a hearing or through an official letter from the agency. This type of interaction was coded as an “agency contact.”

When agency input was provided, I also recorded whether or not the agency, or its representative, testified specifically on the federal court case or set of cases that was at issue in the reaction bill. For example, if the bill was designed to codify the Supreme Court’s decision in *Roe v. Wade* and the Justice Department provided an official letter to the committee opposing the legislation, with a specific reference to the *Roe* decision, this was recorded as an official “agency signal” on the case itself.

“agency signals,” therefore, are a subset of all reports that contained an “agency contact,” but this second category includes only those situations when the agency commented on the specific court case(s) at issue in the reaction bill.<sup>14</sup> Data on the agency signal with Congress was recorded for the period of the 99<sup>th</sup> through the 110<sup>th</sup> Congresses (1985-2008).

While the discussion in this section combines both judicial and agency signals, it is important to recognize the distinct nature of these contacts with Congress by these two branches of government. There are few, if any, constraints on how agency officials contact members of Congress, and because of that the interactions between the two branches are quite extensive. Executive branch officials engage members of Congress at numerous and frequent levels and in a multitude of forums, ranging from informal phone calls or emails to sworn testimony to social gatherings. The Court, on the other hand, has exceedingly little contact, on both a formal and informal level, with Congress due in large part to the Court’s never-ending concerns over its legitimacy and the perception that this can only be maintained through independence and neutrality from the political branches. When the Court, therefore, steps outside its traditional opinion writing boundaries by issuing a signal to Congress regarding a concern or problem it has detected that demands congressional attention, the significance of that contact is arguably qualitatively different than a signal from an agency, which is far less constrained in its interactions with Congress. Whether the location, or simple presence, of a signal from the Executive or the Judiciary has any impact on Congress in developing reform legislation is a topic that will be elaborated upon further in Chapter 5, but the unique properties of these signals is an important point of consideration in the present discussion.

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<sup>14</sup> Later, in Chapter 5, I develop and utilize, for purposes of constructing a statistical model, a distinct type of agency signal that relies on the involvement of the Solicitor General in a particular Supreme Court case, as a proxy for the Executive branch’s view concerning the case that can be easily telegraphed to Congress. While it is a related concept to the type of agency contacts and signals just described above, it is a distinct measurement tool for gauging the views of the Executive branch on a particular case. The type of contacts and signals described in this chapter are derived from information in the congressional committee reports reflecting some form of contact by one or more federal agencies on a particular reaction bill or a specific comment by one or more those agencies about the court case(s) that is (are) the subject of the reaction bill.

To elaborate on the definitions of judicial and agency signals as detailed above, it is useful to review some actual examples of “judicial signals” and “agency signals” within the committee reports themselves. Consider, for instance, bill H.R. 5388 that was reported on by the House Committee on Government Reform during the second session of the 109<sup>th</sup> Congress. The bill was designed to create a congressional district within the District of Columbia, and in detailing the need for the legislation, the committee report specified that the legislation was necessary in light of the District Court for the District of Columbia’s decision in the companion cases of *Adams v. Clinton* and *Alexander v. Daley*<sup>15</sup>. In *Alexander*, citizens of the District of Columbia sued the federal government under the Fourteenth Amendment, arguing that the Constitution required they be given representation in Congress. The District Court dismissed the complaint, and when the Supreme Court denied a petition to review the case, the Congress stepped into the matter.<sup>16</sup> While H.R. 5388 would not have directly overturned that decision, it was designed to modify the effects of that decision by providing the residents of the District of Columbia the right to representation in Congress through a specific legislative entitlement.

In explaining the purpose behind the bill, while simultaneously offering legal support for the legislation, the committee report made several explicit references to the text of the *Alexander v. Daley* case and comments by the judge in that decision both admonishing Congress to take such action and confirming that Congress had the constitutional authority to do so. The report specifically cited a passage from the decision, stating:

Like our predecessors, we are not blind to the inequity of the situation plaintiffs seek to change. But longstanding judicial precedent, as well as the Constitution's text and history, persuade us that this court lacks authority to grant plaintiffs the relief they seek. If they are to obtain it, they must plead their cause in other venues.<sup>17</sup>

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<sup>15</sup> 90 F.Supp.2d 35 (D.D.C. 2000).

<sup>16</sup> *Adams v. Clinton*, 531 U.S. 1045, 121 S.Ct. 646, 148 L.Ed.2d 551 (2000).

<sup>17</sup> House Report 109-593 (to accompany H.R. 5388); citing *Alexander v. Daley*, 90 F. Supp. 2d at 72.

Following this quote, the committee report went on to find that although the district court did not specify what it meant by “other venues,” the committee understood the reference to be Congress itself. As a result, following this signal from the court and the fact that the court believed Congress had the authority to adopt such legislation, the bill providing congressional representation to the residents of the District of Columbia was introduced in the House of Representatives and successfully passed the House Government Reform Committee. Ultimately, the bill never passed in either chamber, likely due to the political ramifications of increasing House seats. But, this example shows that these committees are aware of the signals provided by the courts in the decisions themselves and that the committees rely on those signals to motivate particular pieces of legislation and as a type of “legal cover” for their efforts.

Another example of a judicial signal in the committee report comes from H.R. 603 that was reported on by the House Committee on Transportation and Infrastructure, which later became Public Law 106-181. The bill was designed to explicitly deal with the Supreme Court’s decision in *Zicherman v. Korean Airlines, Ltd.*<sup>18</sup>. In the wake of several airliner crashes that occurred at sea, many family members of the deceased had brought lawsuits seeking damages. But, the Supreme Court found in *Zicherman* that under applicable law the families could only recover pecuniary damages, for things like lost wages, but not compensatory damages for pain and suffering. This ruling resulted in an odd legal distinction whereby family members of people killed in plane crashes that land at sea can only collect pecuniary damages; whereas family members of the deceased killed in a plane crash that falls on land are governed by ordinary tort law and can potentially collect additional types of damages.

In *Zicherman*, the Court, despite ruling against the plaintiffs in that case, recognized the inequity in its holding, and the majority opinion stated that “Congress may choose to enact special provisions

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<sup>18</sup> 516 U.S. 217, 116 S.Ct. 629, 133 L.Ed.2d 596 (1996).



applicable to Warsaw Convention cases, as some countries have done”<sup>19</sup> allowing for a broader array of available damages for accidents that occur at sea. In the committee report accompanying bill H.R. 603, this same passage from the *Zicherman* decision is included directly in the report as part of the explanation and background for the bill. The bill, which eventually became law, changed the governing statutory framework for airliner crashes to correct for the inequality identified by the Supreme Court in its opinion in *Zicherman*. From these two official documents—the Supreme Court decision and the committee report from the House Transportation and Infrastructure Committee—an explicit line of communication between these two branches of government is on clear display, and through that communication an inequitable disparity in the governing law for airline crashes, which the Supreme Court recognized but felt constrained to remedy itself, was later corrected by Congress.

Most of the committee reports are divided into a series of regularly occurring subsections, ranging from a subsection labeled as the “background and need for the legislation” to the subsection on the “Congressional budget office cost estimate” to a subsection labeled “changes in existing law.” One of the subsections that also often appears is called “agency views,” and it is most often in this section where the committee details any official correspondence it has received from one of the federal agencies regarding the legislation under consideration. Since neither of the House or Senate rules require a reproduction of this information within the reports themselves, one can infer that it is done so with some degree of regularity because members of Congress find such information useful as they consider the merits of the bill. Within these official communications, it is not uncommon for the agency to not only offer its support or concerns regarding the legislation, but occasionally they will also comment directly on the court decision that is at issue in the reaction bill.

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<sup>19</sup> *Zicherman*, 516 U.S. at 229.

An example of this can be found in H.R. 1967, a bill addressing the copyright laws for music produced by the House Judiciary Committee during the first session of the 105<sup>th</sup> Congress. The bill was a direct response to a recent 9<sup>th</sup> Circuit Court of Appeals decision, known as *La Cienega Music Co. v. ZZ Top*<sup>20</sup>, which decision had the effect of potentially compromising the copyright protection of all music produced and distributed before 1978. The legislation under consideration would reverse that decision and amend the Copyright Act of 1909 in order to protect the copyright status of the pre-1978 work. Within the committee report, a letter from the Deputy General Counsel of the United States Department of Commerce, addressed to the Judiciary Committee Chairman, is reproduced in full, and within this brief letter the Commerce Department offers its full support for the legislation and discusses the *La Cienega Music Co.* case in some detail. In this letter, the Deputy General Counsel noted that this decision had the effect of “upsetting years of business practices based on what was believed to be settled law,” and the agency thus offered the Administration’s full support behind the legislation and the reversal of the 9<sup>th</sup> Circuit’s decision.<sup>21</sup> Ultimately the bill did not pass, but as noted earlier, since the views of any agency are not required to be discussed in these reports, the Judiciary Committee likely included this information to offer support for passage of the bill considering the support it would receive from the Executive branch.

In some instances, the committee reports will reproduce information from agency officials that disagree with the approach or scope of the proposed legislation and as a result oppose the passage of the bill. An example of this comes from H.R. 424, also produced during the first session of the 105<sup>th</sup> Congress by the House Judiciary Committee. The bill was designed to modify existing law concerning crimes committed with firearms and the associated punishment for the illegal use of firearms, and it

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<sup>20</sup> 44 F.3d 813 (9<sup>th</sup> Cir. 1995).

<sup>21</sup> H. Report 105-325 (supporting H.R. 1967)

came in direct response to the Supreme Court's decision in *Bailey v. United States*<sup>22</sup>. Justice O'Connor, writing for the majority in *Bailey*, had interpreted the word "use," as contained within the pertinent section of the criminal code dealing with the enhancement of any punishment when a firearm is involved, in a narrow fashion such that it only applied when the criminal "actively employed" the firearm during the commission of a crime. The Judiciary Committee, concerned that the Court's interpretation was unduly narrow, drafted the bill that would, in part, eliminate the word "use" and substitute in its place the term "possession" so that even if the criminal didn't actively use the firearm during the crime, its mere possession would be sufficient to justify an enhanced punishment.

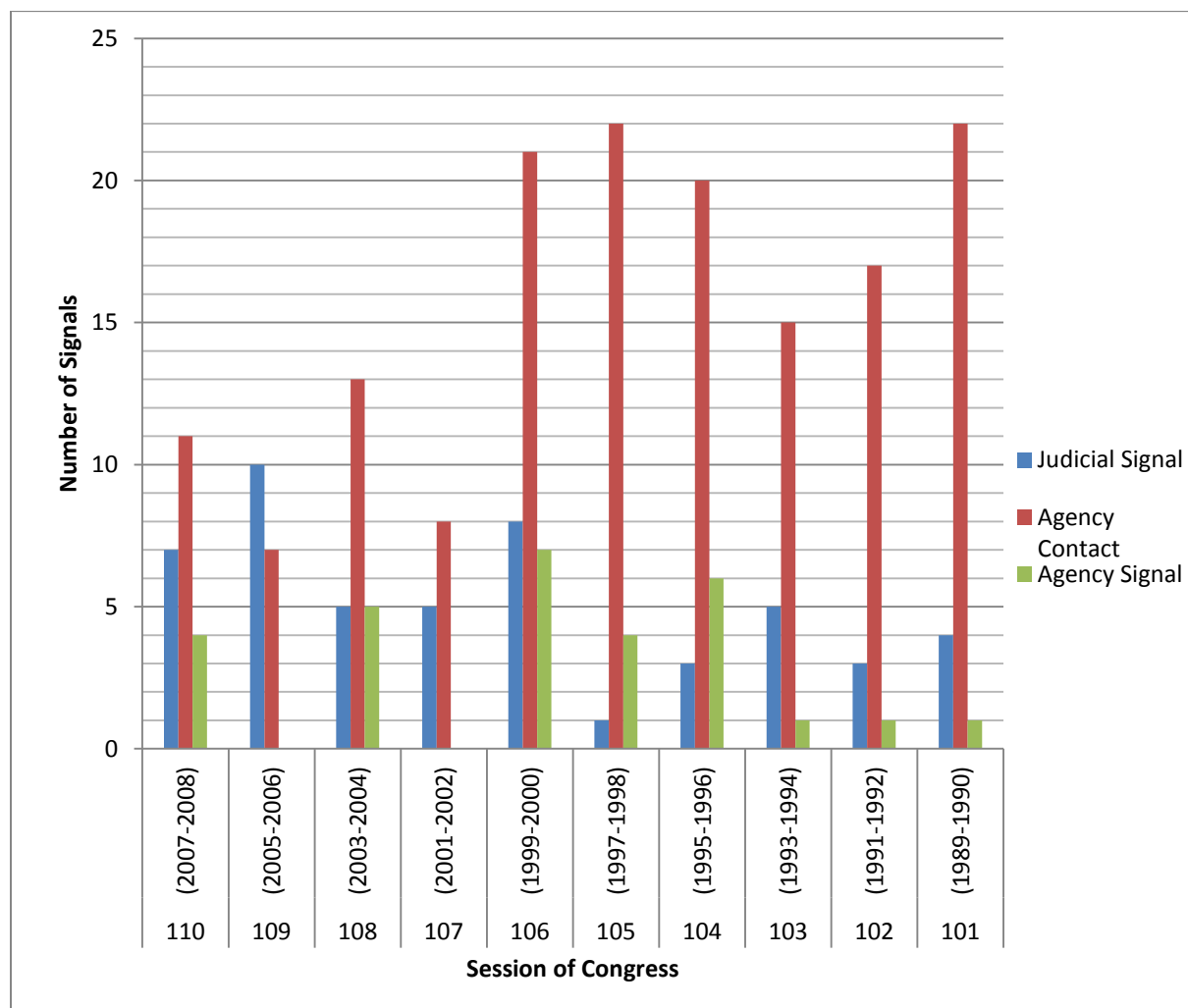
The committee report attached to this bill included a lengthy letter from the Assistant Attorney General within the Office of Legislative Affairs at the Justice Department. The letter discussed in detail the *Bailey* decision and the Justice Department's general agreement with Congress that the underlying statute required amending to reverse the outcome of *Bailey*. But, the Assistant Attorney General went on to detail why the Justice Department believed the change in language proposed by the Committee would not remedy the problem from *Bailey*, and may actually make it worse, and that the modifications to the punishment framework in the bill would be harmful. As a result, the Justice Department, while in agreement with the general goals of the legislation, was unable to offer its support in the bill's current form. Ultimately, the majority of the committee failed to adopt any of the changes suggested by the Justice Department and the legislation proceeded forward. Those within the committee opposing the legislation, however, as noted within their comments in the committee report, did latch onto the concerns expressed by the Justice Department as a reason for opposing the legislation. But, the bill did pass both chambers and eventually became public law 105-386 with the effect of reversing the Court's decision in *Bailey*.

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<sup>22</sup> 516 U.S. 137, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995).

While these examples are useful in fleshing out some of the details of these committee reports and how I define “judicial signals” and “agency signals” within these reports, it is also important to detail a more systematic accounting of these events within the reports. Figure 3.10 details how many committee reports attached to specific bills, between the 101<sup>st</sup> and 110<sup>th</sup> Congresses contained either judicial signals or agency signals. In addition, a third category of information is recorded documenting the number of reports stating that one or more federal agencies had given some level of testimony or official correspondence to the committee on the reaction bill, regardless of whether that testimony or correspondence mentioned the particular case or set of cases at issue in the bill.

The results of this analysis show varying, but consistent, numbers of signals from the executive or judicial branches within the committee reports across each of the ten distinct Congresses displayed in Figure 3.10. On average, the number of judicial and agency signals within the committee reports attached to reaction bills for each Congress totaled five and three, respectively. Some Congresses saw figures well above this average. For instance, the 109<sup>th</sup> Congress had 10 distinct bills containing judicial signals out of a total of 57 reaction bills that term, representing nearly 18% of all bills. Similarly, the 106<sup>th</sup> Congress had seven different reaction bills with agency signals, which amounted to over 13% of all the reaction bills produced in that Congress. In addition, federal agency officials made official contact with committee members as they were considering the legislation, based on those contacts recorded within the reports themselves, on average of 16 different reaction bills per congressional term.

**Figure 3.10: Judicial & Executive Signals: 1989-2008**

**Note:** The “judicial signal” category includes a tally of all committee reports attached to reaction bills where the committee makes reference to a specific signal or admonishment from a court to Congress in the underlying decision. An “agency signal,” similarly, captures a discussion in a committee report where Congress is reporting that one or more federal agencies have made a specific reference to a court decision and urged Congress to take a particular action in response to the case. An “agency contact,” in contrast, captures an instance where one or more agency(ies) viewpoints are expressed in a particular committee report attached to a reaction bill without a specific reference to the case(s) at issue in the reaction bill. Source: Compilation by author from analysis of the texts of U.S. House and Senate committee reports attached to legislation produced between 1989 and 2008.

Most committee reports will not mention the views of either the judiciary or the executive for the obvious reason that, for one, most court decisions do not contain admonishment to Congress to do something so there is nothing for it to cite to. Second, the various executive agencies, due to the

volume of cases and their own limited resources, are not going to have a sufficient interest to proffer an opinion on each of the cases Congress is considering through reaction bills. So, it is not surprising that the overall percentage of bills, and their accompanying committee reports, will make no mention of the views of the judiciary or the executive. However, what is clear from the data are two important findings. First, members of the judicial and executive branches regularly make their views on a particular statute or the court's view of that statute known to Congress, and second, Congress has an institutionalized practice of listening to those views, as those opinions regularly show up in the legislative history of these bills. Those opinions from the other branches offered to Congress often form at least a partial basis for the legislation then-under consideration and as a reason for its passage.

That these signals regularly appear in committee reports attached to reaction bills is evidence not only of a level of ongoing discourse between the branches, but it also shows that they are taking action along a course suggested by an actor or department in a separate part of the federal government. I cannot say, from this data alone, what motivates members of Congress in engaging in such a dialogue, but the fact that there is some form of meaningful communication across the branches at this very high level in the lawmaking process is an important finding in its own right. This finding also offers an important transition into the next two chapters that more closely explore this concept of judicial and executive signaling and endeavor to more definitively answer the question as to why Congress initiates reaction bills in the first place.

#### Conclusion

One of the arguments advanced in earlier sections of this dissertation is that reaction bills represent a significant and important component of the interbranch relationship between Congress and the federal courts, as those courts issue decisions that then prompt a legislative response. Accepting such a proposition, what do the actions of members of Congress in the context of developing reaction

### Chapter 3: Congressional Behavior & Reaction Bills

bills then say about the broader behavior of Congress in the development of legislation and its interaction with the judicial branch? In examining the various internal dynamics associated with reaction bills, as detailed in this chapter, several important conclusions emerge.

Most importantly, much of Congress's behavior, at least in the context of legislating in this important arena of reaction bills, cannot be explained solely with a theory that assumes conflict and contestation drive all or a majority of their actions. We know, for example, that the politics associated with constituent-type policies is more statist in focus, driven by elite actors within government, and not particularly derisive or confrontational. As constituent policies represent one of the most common type of policies addressed in reaction bills, this is direct evidence of a more cooperative type of behavior among members of Congress as they focus on policies centered on efforts to improve governance. Also, this data shows that when Congress does initiate a reaction bill (in about 40% of the cases) such a bill, or a portion thereof, does not represent any form of conflict with the courts, and in many cases evidences actual agreement with the courts. Finally, when developing this legislation, the committee reports attached to these bills show a degree of regularity on the part of the committees in identifying, and acting upon, suggestions offered to Congress by judges/justices or executive branch officials in making modifications to existing laws. These "signals" not only lack any expression of conflict between the branches, but affirmatively show a degree of cooperation between the branches in the development of law. Thus, in place of a theory of congressional behavior situated in conflict and contestation, the totality of this evidence provides a loose outline for an alternative framework for understanding congressional behavior that is more cooperative and statist in its focus, as members of Congress work with officials from the other two branches to govern the nation.

At the same time, the political dynamics associated with the development of this type of legislation does evidence an important degree of contestation and individual policy driven behavior,

suggesting a degree of mixed motivations steering congressional behavior. The majority of reaction bills respond to cases issued by the courts within two years of the bill, which is the general time period when the case is most likely to be salient among the public. While there is no discrete causal story to be told from this fact alone, it is indicative of the possibility that the general public and interest groups may have an important role in driving reaction bills, and the politics in which those groups engage in Congress certainly engenders more confrontation and preference-based behavior. Likewise, the most common type of policy category at issue in reaction bills is regulatory policies, where interest group activity is high and the politics associated with it is well understood to be grounded in conflict as the various actors in Congress compete to enact their agenda.

In combination, the diversity in these findings point to the likelihood that what motivates Congress's behavior, at least in the area of developing reaction bills, is a mixed and diverse range of motivations. Although pieces of the evidentiary body presented in this chapter to support the traditional and dominant theory of congressional and interbranch relations, the idea that contestation is the main motivating factor is not supported herein. In its place, we can see evidence in the minutia of these reaction bills of a desire and goal by members of Congress to work cooperatively with members of the other branches of the federal government in an effort to effectively govern the nation. By no means does this data alone prove that the dominant motive behind Congress's behavior as it interacts with the other branches is driven by a spirit of cooperation. However, such a finding helps to open the door for more empirically grounded theories for what motivates congressional behavior in initiating reaction type legislation, which will be the focus of the succeeding chapters.



## Appendix A: Classification Rules for Arenas of Power Scheme

1. Individual provisions, when considered apart from an entire bill, are categorized according to the nature of the provision itself, rather than according to the bill from which it came.
2. Most bills contain constituent elements, for reasons of administration and implementation. Therefore, bill with such elements are considered distributive, regulatory, or redistributive unless the bill itself deals with purely in-house matters, or unless the administrative provision is considered separately from the rest of the bill.
3. A bill establishing an office, bureau, agency, or the like is constituent.
4. A bill establishing (extending, defining) a program is classified according to the substance of the program, even if a provision of the bill establishes an office or department. If this latter provision is considered separately from the rest of the bill, it is categorized constituent.
5. A bill dealing with relations between one governmental unit and another is constituent.
6. A bill that deals with a substantive program that happens also to involve another governmental unit is categorized according to the substance of the bill.
7. Bills that define powers and jurisdictions are constituent.
8. Bills involving relations with other nations are considered constituent (for example, immigration laws).
9. A bill that simply grants powers is constituent (for example, an act conferring the power to set fees and rates). One that grants power over a particular mandated program area or service is categorized according to the substance of the program itself (for example, a bill that authorizes a government body or official to set fees and rates according to a specific schedule imposed by the bill).
10. A policy is considered distributive if the group affected is identified by what its members do (for example, farmers, small businessmen); if the group's members are identified on the basis of who they are (Indians, poor, elderly, veterans), the policy is considered redistributive. (The one possible exception is students; although student status is akin to a profession, policies affecting students are usually considered redistributive, because students' lifestyles, culture, and so on cause them to be identified as members of a social class rather than a profession).
11. Bills and provisions dealing with planning and research outside of government are distributive. Planning and studying by the government in relation to a governmental program or proposed program is constituent.
12. Bills that appropriate money for a specified program or purpose are categorized according to the substance of the program or purpose. The act of budgeting, however, is constituent (for example, the vote on the total federal budget).
13. All taxes are redistributive unless the tax has another, explicitly stated, purpose (for instance, a regulatory tax—one designed explicitly to modify behavior).

**Note: Classification Rules developed by Robert J. Sptizer (1983), 32-33.**

## Appendix B: A Typology of Congressional Responses to Court Decisions—Coding Rules

*Override/Overrule: If, within the committee report, any of the following sentiments were expressed regarding the particulars of the accompanying bill:*

1. The court misapplied or misinterpreted the original intent of Congress and now the statute must be revised, or a new law created, to restate that intent and overturn the legal impact of the decision or set of decisions;
2. The outcome of the court decision, even if arguably a reasonable application of an existing law, cannot be supported and the law needs to be changed to ensure a similar outcome does not occur in the future;
3. The court overstepped its authority in issuing a decision and now a new statutory framework must be created to limit or prevent a similar outcome in the future.

*Clarify/Modify: If, within the committee report, any of the following sentiments were expressed regarding the particulars of the accompanying bill:*

1. The court decision was unclear or ambiguous necessitating Congress to act by revising an existing law or creating a new one, but there is a lack of any express disagreement or displeasure with the Court decision;
2. The court decision helped to clarify a particular aspect of an existing law but did not go far enough in resolving an ambiguity, requiring Congress to add additional clarity by modifying the existing law;
3. The decision of the court was appropriate for particular circumstances, but the law needs to be modified to ensure the impact of the decision is not extended to other contexts.

*Codify: If, within the committee report, any of the following sentiments were expressed regarding the particulars of the accompanying bill:*

1. Stating that the court's interpretation of a particular law is in line with the congressional purpose and the underlying law should be amended to adopt the basic interpretation offered by the Court;
2. Stating that the court's interpretation of a particular law filled in a gap in the existing law that was sensible and such interpretation should now become an official part of the statutory law;
3. Finding that a particular court decision was inconsistent with existing law but that the interpretation was sensible and the law should be changed to adopt such a finding.



## Chapter 4

If justices in the majority invite congressional action to “rescue” good policy after the Court’s decision, such action demonstrates that they care about achieving good policy.

--Lori Hausseger & Lawrence Baum<sup>1</sup>

### Introduction

What evidence, if any, exists suggesting that the judiciary may be operating in a more coordinated and cooperative framework as it exercises its role in the development of public policy? The conclusion drawn from the prior chapters was that in detailing and describing how reaction bills are developed within the halls of Congress, there is considerable evidence to question whether the two key models to date, which I have classified as the Democracy (Pluralism) and Competitive/Institutional (Political Positivism) Models can adequately explain the universe of inter-institutional lawmaking behavior in light of this detailed analysis of reaction bills in Congress. Instead, I have sought a space for the cooperative/state-centered model based, in part, on the evidence of the reaction bills in Congress, as an explanation for how an important component of interbranch relations unfolds in the context of developing new laws. For such a model to be robust, however, it is necessary to examine whether some of the same cooperative types of behavior can be found within the judiciary, focusing primarily on Congress’s coordinate branch—the Supreme Court—to determine whether those actors might also behave in a more cooperative and coordinated manner with the goal of advancing good public policy. Such an argument stands in opposition to the assumption that members of the Court only seek to advance their preferred policy positions, especially vis-à-vis the other branches of government, with little or no regard to the effect of those decisions on individual litigants or the public as a whole.

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<sup>1</sup> Hausseger & Baum (1999, 182).

## Chapter 4: Judicial Signals

The purpose of this chapter, therefore, is to closely examine the behavior of members of the Court, through their opinion writing, in search of any evidence that the Justices regularly communicate their preferences to Congress through their decisions. I locate such evidence in the form of judicial signals, which are statements in the Court's opinions inviting Congress to act on the underlying law at issue in the decision just issued by the Court. The presence, and frequency, of these signals is significant for two reasons. It further confirms and strengthens the notion that a new framework of governance is warranted, given that it is not only Congress seeking input from the other branches but the Court itself is also actively engaging in such a dialogue. Second, evidence of any direct and regular communication between the Court and Congress implicates the ongoing and active debate concerning how the justices decide cases. The two main models, to date, seeking to explain judicial behavior—the attitudinal and strategic models—both assume the justices decide cases with the primary goal of maximizing their own interests. The information presented in this chapter seeks to add additional layers of detail into the behavior of the justices, in turn challenging these two traditional models of judicial behavior, and seeking a new consensus for understanding how the Court decides cases.

### Overview: Judicial Signaling

At the end of Chapter 3, I discussed the fact that it was not uncommon to find evidence within the congressional committee reports attached to bills that members of Congress are, in effect, listening, and in some cases acting upon, suggestions or recommendations concerning the scope of a particular policy offered by individual actors within the other branches of government. In justifying or articulating the reasons behind a particular bill, these reports would often reference the concerns offered by federal judges or justices within the opinions themselves or those concerns that executive agencies may have about a particular decision. In the context of the judiciary, these signals, as I labeled them, came in the form of reservations or concerns offered in a majority, concurring, or dissenting opinion that are

directed explicitly at Congress. If the particular committee responsible for drafting the bill referenced that concern in the committee report, I recorded this as an instance of a bill containing a judicial signal. Separately, among those committee reports that, generally, referenced some type of testimony being given by one or more federal agencies, and, specifically, testimony by an agency directly on the case(s) at issue in the bill, I recorded those bills as containing some basic level of agency contact or a specific signal from the agency on an actual case. Evidence of signaling, particularly from the judiciary, in the committee reports is suggestive of the fact that there may be a broader system of communication and cooperation between the branches in the development of policy that manifests itself within the decisions themselves.

To date, the limited amount of literature researching the topic of judicial signaling has found support for the notion that justices on the Supreme Court do issue appeals to members of Congress in a small percentage of their decisions. In a pathbreaking article on the topic of legislative-judicial relations and the presence of invitations or cues within the decisions, Lori Hausseger and Lawrence Baum in an article titled, *Inviting Congressional Action: A Study of Supreme Court Motivations in Statutory Interpretation* (1999), for the first time provided a systematic accounting of what they referred to as “invitations” within Supreme Court statutory cases. The questions posed in this article included how often these invitations appear in Supreme Court decisions, why the Court might issue such invitations, and how the presence of such invitations impacts the vitality of the dominant theories of judicial decision-making. The results of their comprehensive analysis were supportive of an entirely new hypothesis. Specifically, they concluded that one motivation for invitations to override their own decisions is a desire on the justices’ parts with “achieving good law and good policy” (Hausseger & Baum 1999, 182).

This conclusion stands in contrast to the two main theories of judicial behavior, one being the *attitudinal model*, which relying on some of the tenets of rational choice theory, asserts that the justices are solely interested in maximizing their policy preferences regardless of the desires or concerns of the other branches. The second concept—labeled as the *strategic model*—also relies on rational choice theory, but in contrast to the attitudinal model posits that the justices act strategically to achieve their preferred positions and recalibrate their decisions in order to minimize the possibility that Congress, in particular, will override their decisions. While not labeling their work as a new theoretical model, Hausseger and Baum argued, in contrast, that these invitations to override within the opinions do not make a lot of sense if we are to assume that justices are single-minded policy-maximizers. Instead, they concluded their motivation for regularly issuing these invitations in the opinions was a desire to achieve good policy.

Hausseger and Baum were not the first scholars to examine the prevalence of these judicial signals and the reasons behind the justices placing them in their opinions, but they were the first to consider, and systematically explain, the fact that the justices motivations may be mixed and complex and cannot be explained all the time within the traditional attitudinal or strategic models. In the past, those scholars discussing the presence of invitations have sought to ground their explanations within rational choice framework. For instance, Murphy (1964) argued that in including these invitations the justices may indeed be acting strategically to induce Congress to change a statute and adopt a policy position that is preferred by the Court, but the Court, feeling constrained for whatever reason, believes it cannot adopt such a position itself. Separately, Eskridge (1991) argued that concerns over institutional legitimacy would prompt the Court to issue such invitations. Not comfortable implementing a major policy decision itself, but preferring such a position, Eskridge thought the Court might issue such an invitation to achieve its preferred position but inducing Congress to make the actual change.

More recently, relying on the strategic model, Spiller and Spitzer (1995) viewed the federal courts as containing a mix of sophisticated judges or justices, who take congressional views into account, and more sincere judges or justices who simply vote their preferred positions. The sophisticated judges or justices would then manipulate their less strategic colleagues to induce them to support a decision that might align with the preferred position of that more sincere judge or justice but contains an invitation within the decision so that Congress will later change the law to bring the policy more closely in line with the strategic judge's or justice's position. Nonetheless, in their analysis, Spiller and Spitzer (1995) found that the predictions generated from such a hypothesis often did not align with the actual behavior of the justices on the Supreme Court. Later, Spiller and Tiller (1996) argued that the policy preferences of a judge or justice are not unidimensional; rather, they operate on both a preferred policy dimension and a more traditional legal rule dimension that dictate how they are to interpret statutes and apply past precedent. In some cases, these two spectrums do not align, in which case they rely on the formal legal rules they prefer in deciding the particular case at hand but issue an invitation to Congress to reverse that decision so as to achieve their preferred policy position. While positing a robust theory, they found little empirical support for this idea by not conducting a more systematic analysis of judicial behavior.

Each of these explanations offered by a variety of scholars seeks to account for the regular presence of invitations within judicial opinions within the traditional context of the rational choice framework. While each of these ideas has some merit, both on an individual and collective level, they each have serious limitations. Some of these accounts offered plausible explanations but found little empirical support, while others do seem to explain the presence of invitations in certain instances. Yet, none of these studies systematically appear to account for, and explain in a comprehensive manner, the reason for invitations or signals to Congress in judicial opinions. Hausseger and Baum (1999), after recording data on the presence of judicial invitations in all of the Supreme Court's statutory decisions



across a period of five Court terms, offer the most comprehensive and systematic accounting of the frequency of invitations in judicial opinions. Through their model, which seeks to test both the attitudinal and strategic models against a new hypothesized relationship that some of the justices desire good policy and law, they find evidence that the justices try and achieve both good law and policy and that when a conflict arises between the two they will “follow the law as they see it while asking Congress to supplant their choice with good policy as they see it” (Hausseger and Baum 1999, 182).

This finding by Hausseger and Baum is of immense importance, as it casts doubt on the two main models of judicial behavior—the attitudinal and strategic models—both of which are based on a rational choice framework, at least in terms of offering a plausible explanation for why the justices regularly insert these invitations within their opinions. In place of these traditional accounts, they suggest a different motive may be regularly driving some of the justices in at least some of the decisions they issue that is based on a desire to achieve good policy instead of just their own preferred positions. On the surface, this finding, while important, is limited to an explanation of judicial behavior. However, it is suggestive of a more complex dynamic in congressional-judicial relations in which these two branches are communicating with one another at a very formal and high level in the development of policy. If federal judges and justices are issuing these invitations in their opinions with the expectation that Congress is listening, regardless of what reason may be motivating the judge or justice, this fact naturally leads to the next question, which, generally speaking, asks whether Congress does anything with this information? As the topic of the next chapter, and more broadly this dissertation as a whole, is to query why Congress initiates reaction bills against certain court decisions and not others, these invitations or signals from the Court present a natural place of inquiry in seeking to understand the effect of these interbranch relationships and whether that relationship influences the direction of public policy.

### Identifying Case Signals

Before any potential influence of judicial signals on Congress, in the context of motivating reaction bills, can be understood, it is necessary to develop a more comprehensive accounting of the frequency of signals, or invitations, in Supreme Court decisions. To detail any such phenomenon, I developed a comprehensive database of more than 670 Supreme Court decisions across a ten-year time span that methodically looks for the presence of signals in each decision. The construction of such a database proceeded along a series of steps. First, only those decisions issued by the Supreme Court are included. Limiting the analysis to Supreme Court decisions was done for several reasons. In considering the broader lawmaking process, I am most interested in Congress's relationship with its coordinate branch—the Supreme Court. Certainly the lower federal courts have an important role to play in defining the meaning of statutes and making policy, but the Supreme Court is, ultimately, the judicial body that has the final say on any matter (within the confines of those cases filed in federal court and petitioned to the Supreme Court for review) it desires. Unlike the lower federal courts, the Supreme Court is its own distinct constitutional branch of government.<sup>2</sup> Supreme Court cases also, as a general rule, generate the greatest attention and interest from various governmental and non-governmental actors, and as a result, allow for a variety of factors, germane to the cases themselves, to be tested in an effort to discover why Congress responds to certain Supreme Court decisions and not others. Finally, the amount and diversity of data associated with Supreme Court decisions is the most robust among all the federal courts, allowing for multiple hypotheses to be tested in an effort to discover the reasons why Congress might respond to court decisions.

After settling on only those decisions issued by the Supreme Court, the set of decisions to be analyzed was narrowed further to include only those cases that were decided upon on a basis of

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<sup>2</sup> Art. III, Sec. 1 provides for courts inferior to the Supreme Court (i.e. the lower federal courts), but these are established only through an act of Congress.

## Chapter 4: Judicial Signals

statutory law. Given that the Supreme Court is the highest court in the United States, much of its annual docket consists of cases devoted to matters of constitutional interpretation and meaning. However, as detailed in the prior chapters, the overwhelming majority of reaction bills concern matters of statutory law. In other words, most reaction bills are generated from decisions by the federal courts as to the meaning of a particular statute, and the bill itself typically involves an amendment to an existing statute or section of the United States Code or the creation of an entirely new set of statutes. Also, since the focus of this dissertation is on the policymaking process as it generally pertains to the day-to-day functions and operations of the government, the interest here is on the nation's statutory public law system and not the creation of constitutional doctrine.

In order to focus only on those Supreme Court decisions involving matters of statutory interpretation, the Original Supreme Court Database first developed by Harold Spaeth was utilized. This database codes a variety of factors particular to each decision issued by the Supreme Court going back to 1953, and it is regularly updated to the near present day. Several of the variables record the primary, secondary, and tertiary authority for the decision that was issued by the Supreme Court. One of the codes for each of these three variables accounted for whether the majority in each particular case interpreted a statute or court rule as a basis for its decision in the case. If any of these three distinct variables was coded as a "4," meaning at least part of the case involved an interpretation by the Court of a statute or court rule, that decision was included in the newly created database of the Supreme Court's statutory decisions. In an average term, even by limiting the data set to only statutory cases, this resulted in a set of cases totaling approximately 50% of all the cases that were the subject of an oral argument and formal written opinion issued by the Supreme Court each term.

After identifying only those Supreme Court decisions involving statutory matters, it was then necessary to limit the cases to a defined period of time. The primary reason for imposing such a

limitation was because it was necessary to review each decision for the presence of signals within the opinions, and since such a review is time intensive it was only possible to analyze a finite number of cases. Thus, the database is limited to all of the Supreme Court's statutory decisions across a ten-year period of time, specifically beginning with its 1986 term and ending with the 1995 term. I selected a ten-year period of time, beginning with the 1986 term, for a number of reasons. First, this span of time provided a large enough number of cases such that there was adequate variability and sample size to later test some different hypotheses through a variety of regression analyses designed to test why Congress responds to Supreme Court decisions. In particular, the dataset included 671 distinct decisions that were formally decided by the Supreme Court and met the earlier criterion of involving a matter of statutory interpretation. Second, there was an adequate degree of turnover in Justices during this timeframe such that an analysis of the behavior of multiple Justices could be evaluated. While, in the modern day, there are only nine available seats on the Supreme Court, during this ten-year period 14 different individuals served on the Supreme Court for at least one term, meaning five of the justices who were on the Court during the 1986 term were replaced, for whatever reason, at some point during this ten year time span with someone new.

The database begins in 1986 because it allowed me to cross-check some of my results with similar work done by Hausseger and Baum (1999) in their article on judicial signals. They examined a five-year period, beginning with the 1986 term of the Supreme Court, and by comparing their results with my own (to be discussed in greater depth later in this chapter) this validates that the coding rules (adapted from their article) were applied in a similar manner to my own data. Finally, by beginning with the 1986 term and ending with the 1995 term, I accounted for lag effects given that it takes Congress, sometimes, a considerable number of years to respond to decisions by the Court. If a case was likely to receive a response, it was important to capture as many of those cases as possible. If you will recall from the prior chapter, while the probability that a case more than ten years old will be subject to a

congressional response is relatively low, Congress does still respond to cases that are more than ten years old at a measurable rate. It is always possible that many years from now the Congress at that time will initiate a reaction bill against a case decided during this time span, but I can be fairly confident that the overwhelming majority of cases decided between the 1986 and 1995 terms that could be subject to a congressional response, by the time of this study, have already received such a response. Reaction bills are not a static process, but any analysis of them has to establish certain cut-off points in order to assess the data and the underlying process. For these reasons, I believe this data set provides an accurate window onto those Supreme Court cases likely to be subject to a reaction bill.

With the various parameters of the database established, it was then necessary to begin the process of identifying signals from the justices within these 671 opinions. The initial step in identifying such signals was to define the criteria for language in the opinion that constituted a “signal.” Closely following the criteria first established by Hausseger and Baum (1999) in their analysis of a parallel concept of judicial “invitations,” I divided judicial signals into three categories: (1) very strong signals; (2) moderately strong signals; and (3) weak signals. In the statistical analysis to be discussed in the next chapter, the strength of the judicial signal was not a factor, as the focus was only on the presence or absence of a signal in each decision. But, as part of a broader analysis, it was important to account for any variability in the strength of the signal from the various justices across these decisions. Subtle suggestions to Congress versus explicit commands suggest very distinct viewpoints as to the nature of this relationship, so delineating between the relative “strength” of the signals offers some insight into these interactions. Common to all three categories of signals was the explicit mention of Congress, or a more generic reference to the legislative branch through a variety of synonymous terms, within the text of the written opinion. The divergence between categories centered on how direct the signal or invitation to Congress was and the level of detail associated with the underlying statute as provided by the particular justice in their opinion.

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While the precise details of the coding rules for each of the three categories is provided in Appendix A, a brief description of each category is as follows. A decision was recorded as containing a “strong signal” if in one or more places throughout the opinion there was an explicit call to Congress to take action or a direct statement saying that the statute, as currently drafted, creates a problem that Congress needs to examine. “Moderate signals” included text where the Justice implied there may be a problem with a particular statute that Congress would want to reconsider, language suggesting the decision may create a problem that Congress might want to review, or saying that if Congress disagrees with the Court’s decision it is free make a change to the statute. “Weak signals” failed to highlight any disagreement between the Court and Congress, but contained language calling on Congress to change the statute or make its intent clearer if it desires a different result than what was produced by the particular case.

Upon locating signals within any of these three categories, I subsequently recorded whether the signal appeared in the majority, concurring, or dissenting opinion associated with each case. For Hausseger and Baum (1999), the location of the invitation in relation to these three types of opinions made a difference in their coding decisions. In their case, if certain types of invitations occurred in concurring or dissenting opinions they did not record such a decision as containing an invitation. Theoretically, this decision made considerable sense as their research question focused on the behavior of the justices, and in trying to determine the judicial motivation for these invitations it is reasonable to conclude there is something qualitatively different between an invitation in a majority versus a dissenting opinion. For my purposes, however, no such differentiation was made. In other words, if a signal was present regardless of whether it was found in a majority, concurring, or dissenting opinion, that particular case was recorded as containing a signal. The reason for this is that my ultimate research question centers on understanding what motivates Congress in initiating a reaction bill. The goal is to test whether any communication from the Court to Congress, regardless of its source, is important

information that prompts a congressional response. Whether that communication comes from the majority or the dissent is, for my theoretical purposes, irrelevant. Nonetheless, as part of a broader analysis of signals in judicial opinions, it is interesting and valuable to take note of what part of the opinions these signals originate from and what level of variation exists.

With the parameters for identifying judicial signals across a defined set of Supreme Court cases established, it was then necessary to review all 671 decisions to locate the specific signals within these decisions. Given the volume of cases and the average length of decisions issued by the Supreme Court, I again relied on the Atlas.ti tool described in earlier chapters of this dissertation. In order to search each decision with Atlas.ti, it was first necessary to acquire electronic copies of each decision. Within Spaeth's Original Supreme Court Database, several variables exist for each decision based on the citation for the various reporters that publish Supreme Court decisions. Thus, each of the 671 statutory cases identified earlier had attached to them a variable, or multiple variables, detailing the citation for that case. With that information, I searched online at Lexis and Westlaw and queried all Supreme Court cases that had been subject to oral argument and a formal written decision for each term of the Court between 1986 and 1995. After obtaining those results, I downloaded only those decisions with case citations matching to the 671 decisions identified earlier. Once all the decisions were downloaded, they were uploaded into Atlas.ti and searched using a specific set of criteria based on the coding rules. A detailed description of the search terms and parameters, and the process for identifying signals within these decisions, is discussed in Appendix B.

As a general matter, however, I relied on Atals.ti to search for instances in these decisions where the word "Congress" or synonymous terms such as "legislature" were used in close proximity with a series of different operative terms that were indicative of a signal to Congress. Examples of terms used included words such as "disagree," "mistake," or "amend," all of which had root expanders applied

when appropriate. Finally, a third category focused on the occurrence of terms referencing some discussion of the law, with search terms like “statute” or “code.” When one or more terms from these three categories appeared in close proximity to one another that section of the opinion was highlighted and reviewed to determine if it met the criteria for one of the three categories of judicial signals. If so, the particular decision was recorded as containing a signal. In addition, the category of signal was recorded, the part of the opinion the signal was found in was recorded, as well as the name of the justice who wrote the portion of the opinion in which the signal was located.

### Describing Case Signals

With the criteria for identifying judicial signals in Supreme Court opinions outlined, the naturally successive question is what do signals actually look like? This section provides several examples of judicial signals for the purpose of better orienting the reader to the concept described above. Consider, for example, the Supreme Court’s 1994 decision in the case of *McFarland v. Scott*<sup>3</sup>. The case arose out of a murder conviction and death sentence imposed by the State of Texas against Frank McFarland. Shortly before his scheduled execution in Texas, McFarland commenced an action in United States District Court for the District of Northern Texas by filing a pro se motion to challenge his conviction under the federal habeas corpus statute (28 USC §2254). Under federal law, specifically 21 USC §848(q)(4)(B), Congress created a federally protected right for qualified legal representation for defendants in capital cases who have filed habeas corpus petitions. The statute allows such a defendant to seek a stay of execution so that legal counsel can be appointed and such counsel can have an opportunity to prepare and file the actual habeas petition. Both the District Court and the Court of Appeals for the Fifth Circuit denied McFarland’s petition to stay the execution because the statute authorizing such a stay is only triggered once a habeas petition has been filed. Since McFarland had yet

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<sup>3</sup> 512 U.S. 849, 114 S.Ct. 2568, 129 L.Ed.2d 666 (1994).



to file the habeas petition, both courts concluded that his statutory rights to legal counsel and to stay the execution were not ripe, and thus he could not avail himself of the right to stay the execution.

On appeal to the Supreme Court, a majority of the Court reversed the Fifth Circuit's decision, holding that the district court *did* have jurisdiction under the relevant law to enter a stay of execution while the defendant retained legal counsel and that counsel prepared a petition for habeas corpus. The majority found that it was implicit in the right to legal counsel and the ability to file a petition for habeas corpus that the District Court have jurisdiction and discretion to enter a stay of execution while these other rights were pursued by the defendant and their legal counsel. Writing for the dissent, Justice O'Connor agreed with the majority that federal law did entitle a criminal defendant to the appointment of legal counsel and for the assistance of legal counsel in preparing a federal habeas corpus petition. The source of disagreement, however, was over whether the district court had jurisdiction to enter a stay if the petition was not already pending. As noted by O'Connor, the habeas statute provides in relevant part that "[a] justice or judge of the United States before whom a habeas corpus proceeding is pending, may . . . stay any proceeding against the person detained in any State court."<sup>4</sup> Since, in McFarland's case, no petition was pending at the time of his application to stay the execution, as he needed legal counsel appointed first to assist in the preparing and filing of such a petition, he was not, in O'Connor's opinion entitled to a stay of his execution.

In reaching this conclusion, O'Connor went on her dissenting opinion to note that the majority's interpretation of the statute creates a problem by implicitly reading terms into the statute that are not there, suggesting that such a modification is for Congress and not the courts. Specifically, she noted:

Congress is apparently aware of the clumsiness of its handiwork in authorizing appointment of an attorney under 21 U.S.C. § 848(q)(4)(B) "in any post conviction proceeding," while leaving intact 28 U.S.C. § 2251, which authorizes a stay only when a "habeas corpus proceeding is pending." See S. 1441, § 3(b), 103d Cong., 1st Sess. (1993). The remedy for this problem,

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<sup>4</sup> 28 U.S.C. § 2251

however, lies with Congress, and not, as the Court would have it, by reading the Anti-Drug Abuse Act of 1988, Pub. L. 100-690, 102 Stat. 4393, to impliedly amend the habeas statute. See *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 134, 42 L. Ed. 2d 320, 95 S. Ct. 335 (1974). Such a reading is inconsistent with our prior cases and with the important federalism principles underlying the limited habeas jurisdiction of the federal courts. I would leave the matter to Congress to resolve.<sup>5</sup>

Her argument, here, is relatively straightforward. Congress, she believes, knew what it was doing, however unartfully, in crafting these statutes and purposefully designed the statute to only allow a judge to order a stay once a habeas petition was actually pending. Second, if there is a problem here, then Congress needs to act to amend the statute rather than the Court reading terms into the law that are not explicitly present. Finally, despite these earlier observations, the implication is that Congress needs to take a closer look at the statute to rectify any “clumsiness” with its earlier drafting.

Following this admonishment from the Court, albeit with some delay, the 109<sup>th</sup> Congress initiated legislation designed to overturn the Court’s decision in *McFarland*. The Conference Committee report on the legislation made an explicit reference to the *McFarland* decision and that the new legislation would overturn the majority’s decision in that case. Specifically, what became Public Law 109-177, amended 28 USC §2251 by adding a specific definition of “pending” to the law, which was the issue flagged by Justice O’Connor in dissent. Under the new law, a habeas corpus petition is not pending until the application has actually been filed. The 109<sup>th</sup> Congress, in effect, endorsed the dissent’s reading of the statute in *McFarland* that the term pending in the earlier iteration of the statute meant that the application had to have been previously filed for the district court to assert jurisdiction and stay any execution proceeding. Yet, because the majority of the Supreme Court had settled on a different meaning, it was incumbent upon Congress to add additional text to the already existing statute providing an explicit definition of the term “pending.”

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<sup>5</sup> *McFarland*, 512 U.S. at 863.

A separate example showing a moderately strong signal from the Court to Congress can be found in the 1989 case of *Patterson v. McLean Credit Union*<sup>6</sup>. In this case, the petitioner, Brenda Patterson, filed a lawsuit against her former employer, McLean Credit Union, arguing that she had been harassed, passed over for promotion, and eventually terminated all on account of her race, which she argued violated 42 USC §1981. Ms. Patterson had worked for the Credit Union for about ten years, and among her other claims she argued she was subject to harassment by representatives of her employer on account of her race. 42 USC §1981 prohibits discrimination in the formation and enforcement of private contracts, and the Supreme Court had previously ruled that the prohibition on discrimination extends to racial discrimination. Both of the lower courts in this case determined that a claim of racial harassment was not actionable under §1981, refusing to allow her to move forward on that claim.

Relying on an earlier decision in the case of *Runyon v. McCrary*, 427 U.S. 160 (1976), the Supreme Court affirmed the decision of the Court of Appeals finding no cause of action for racial harassment under §1981. In *Runyon*, the Court had previously held that “racial harassment relating to the conditions of employment is not actionable under § 1981 because that provision does not apply to conduct which occurs after the formation of a contract and which does not interfere with the right to enforce established contract obligations.”<sup>7</sup> Reluctant to overturn that decision, and relying on the doctrine of *stare decisis*, the Court again found in the case of *Patterson* that a claim for racial harassment could not be pursued under §1981.

Writing for the majority, Justice Kennedy believed that under the *stare decisis* doctrine the Court had little choice but to follow its earlier decision in *Runyon*. Nonetheless, because it was a case of statutory interpretation, he specifically pointed out that Congress can undue both decisions. To this end, he stated:

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<sup>6</sup> 491 U.S. 164, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989).

<sup>7</sup> 491 U.S. at 172.

We have said also that the burden borne by the party advocating the abandonment of an established precedent is greater where the Court is asked to overrule a point of statutory construction. Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done.<sup>8</sup>

While this passage does not qualify as a “strong signal” because Kennedy does not call on Congress directly to act or explicitly state that the statute, as interpreted, creates a problem that Congress needs to examine, it is a clear example of a moderately strong signal. Kennedy notes that while there is a principled reason for the Court reaching its decision in this case, if Congress disagrees with the outcome it has the legislative tools to modify the Court’s findings. Of particular interest in this example is the fact that this signal appears in the majority’s opinion. Seemingly confident of the decision reached in this case, Kennedy takes the time to include in the text of his opinion the somewhat obvious fact that Congress can overturn this decision if it disagrees with the outcome. Such a statement is not directly pertinent to the Court’s decision, and it is odd for it to be included because the majority is in effect inviting Congress to review and possibly overturn its decision. If, indeed, the behavior of justices on the Court can be explained through the attitudinal or strategic models such that it can be assumed the justices, in deciding cases, are trying to maximize their policy preferences, it is challenging to explain under such models why the majority would ever signal to Congress to review its decision with the purpose of overturning or modifying the decision just issued.

*Patterson*, along with nearly a dozen other Supreme Court cases from the late 1980s, was shortly thereafter subject to one of the most comprehensive reaction bills in congressional history in terms of the number of Supreme Court decisions overturned in a single new bill. That law, popularly referred to as the Civil Rights Act of 1991, among other items, targeted a more conservative approach to employment discrimination law taken by the Supreme Court in the mid-to-late 1980s across a series of decisions. Many of those decisions arose under various provisions of the original Civil Rights Act of

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<sup>8</sup> 491 U.S. at 172-3.

1964, and both individually and collectively these decisions narrowed the scope of the type of claims litigants could bring under federal law alleging discrimination or harassment in the workplace on account of the protected classification, such as race, that the litigant fell within. Congress, controlled by Democrats at this time, viewed these decisions as undermining the intent of the 1964 Civil Rights Act and, in some cases, what had been settled law within the Supreme Court itself for several decades following the original passage of the 1964 Act. The 101<sup>st</sup> Congress made the first attempt to reverse *Patterson* and several other related Supreme Court decisions from this era by passing a bill amending the 1964 Act, explicitly allowing for claims of this nature to proceed under the amended statute, and, in effect, overturning many of these decisions. That bill, however, was vetoed by President Bush, which Congress was unable to override. A similar bill reemerged in the 102<sup>nd</sup> Congress, and it was passed and signed by President Bush into law despite his earlier objections, which many commentators attribute to the proximity of the presidential election cycle in 1992 and Bush's concern over the perception of again vetoing a major civil rights law among the nation's minority voters. Thus, in the end, Congress ended up doing precisely what Justice Kennedy signaled to Congress it was capable of doing by amending the underlying statute to reverse the Court's decision in *Patterson*.

A final case, detailing an example of a “weak” signal issued by the Court, involved a matter concerning the intersection between federal employment and national security concerns. The case, *Department of Navy v. Egan*<sup>9</sup>, arose when the plaintiff, Thomas Egan, lost his job as a laborer at the Trident Naval Refit Facility in Bremerton, Washington. The job, given its sensitive nature working on nuclear submarines, was conditioned on Mr. Egan successfully obtaining the requisite security clearance from the Navy following various background checks. After beginning his job, Mr. Egan's security clearance was denied following the discovery of some criminal convictions and problems with alcohol, at which point his employment was terminated. Under federal law, employees working for the federal

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<sup>9</sup> 484 U.S. 518, 108 S.Ct. 818, 98 L.Ed.2d 918 (1988).

government are guaranteed various procedural protections in their employment, and an agency called the Merit System Protection Board was also created to ensure these protections are upheld. Mr. Egan initiated a review of his employment termination with the Board, and in these proceedings the government argued that the Board had authority to review the case to make sure the appropriate procedures were followed but that it did not have jurisdiction to review the underlying determination on Mr. Egan's security clearance. After a series of decisions and appeals, the Court of Appeals for the Federal Circuit ultimately ruled that the Board could review the basis for the denial of the security clearance in its review of Mr. Egan's case, which determination was at issue in the Supreme Court's decision.

In reaching its decision, the Court of Appeals noted the fact that nothing in the merit system law prohibits the review of a security clearance determination that they argued created a strong presumption in favor of review. The Supreme Court, however, focused on the constitutional rights and responsibilities of the executive branch. In particular, they noted the fact that the President is the "Commander in Chief of the Army and Navy of the United States"<sup>10</sup> and that the Court has long recognized that the Executive has authority over conducting national affairs, including making determinations about national security. As such, despite the lack of any prohibition on the Merit Board reviewing security clearance determinations, the general rights given to the Executive in making unfettered decisions about national security and clearance to sensitive materials was the overriding factor in this case. The Court therefore reversed the decision by the Court of Appeals, holding that the Merit Review Board did not have jurisdiction to review the government's decision to deny someone a security clearance.

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<sup>10</sup> U.S. Const., Art. II, § 2.

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In making this determination, Justice Blackmun, writing for the majority, outlined the Executive's broad authority in areas of national security and the Court's general deference to decisions by the Executive in that area. But, Blackman took note of the fact that the Court's determination could be amended if Congress specifically desired a different outcome. The language in the opinion evidencing this signal was as follows:

The Court accordingly has acknowledged that with respect to employees in sensitive positions "there is a reasonable basis for the view that an agency head who must bear the responsibility for the protection of classified information committed to his custody should have the final say in deciding whether to repose his trust in an employee who has access to such information." *Cole v. Young*, 351 U.S. 536, 546 (1956). As noted above, this must be a judgment call. The Court also has recognized "the generally accepted view that foreign policy was the province and responsibility of the Executive." *Haig v. Agee*, 453 U.S. 280, 293-294 (1981). "As to these areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities." *United States v. Nixon*, 418 U.S. 683, 710 (1974). Thus, unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs.<sup>11</sup>

At the end of the passage, there is an express reference to Congress and acknowledgment of the fact that it can modify the result reached by the Court in this particular case. What makes it a "weak" signal though is the absence of any express disagreement with Congress or indication that Congress needs to review the matter. There was no need, however, for the Court to take a particular strong position vis-à-vis Congress because the statute at issue in the case did not directly deal with questions about national security. It likely was not a situation contemplated by the Congress responsible for passing the original merit system law. The Court here is really acting more as an information conduit, suggesting to Congress that if it wants the Court do go in a different direction on this issue, it needs to specifically address the situation that emerged in *Egan* and detail how it would like to see analogous cases dealt with in the future.

Congress took up this question over the balance between national security, executive privilege, and the procedural rights of federal employees over a decade later during the 107<sup>th</sup> Congress. In a bill

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<sup>11</sup> 484 U.S. at 530.

that eventually died after it was reported on by the then Senate Governmental Affairs Committee, Congress sought to overturn a recent decision by the Court of Appeals for the Federal Circuit that the Merit Personnel Systems Board did not have jurisdiction to review a claim that an employee's security clearance was pulled in retaliation for being a whistleblower. The Senate Committee thought such a result was untenable, and the bill was designed to give the Board authority to review cases involving whistleblower claims. In justifying the legislation, and locating authority for this new bill, the committee cited to the case of *Egan* and Justice Blackmun's signal to Congress in that case. The committee report quotes the precise passage from the *Egan* case that is detailed above, relying on that implicit authorization from the Court to legislate in this area of the law. The bill, should it have become law, as noted in the report, codified the central holding in *Egan* that the Personnel Board does not have jurisdiction to review the substance of the underlying security-clearance determination. But, in crafting the legislation, the Governmental Affairs Committee in the Senate also partially relied on the signal from Justice Blackmun in *Egan* to carve out a narrow exception in the law where a level of review by the Board can take place when a whistleblower's clearance is revoked in retaliation for making a protected disclosure. Ultimately this particular bill did not become law, but it is a clear example of a signal from the Supreme Court concerning a current law being subsequently identified by Congress and motivating a potential change in the law based, at least in part, on the concerns raised by the Court in the earlier decision.

### *The Frequency of Judicial Signals*

With the method and underlying data set used to locate judicial signals and specific examples of such signals now detailed, I next turn to a more empirical accounting of the frequency of judicial signals, the types of opinions in which they are most often issued, and the justices who most often insert such language into their opinions. Analyzing data on the frequency of judicial signals in Supreme Court



opinions is important in analyzing three distinct questions concerning judicial behavior and the nature of the interaction between the Supreme Court and Congress. First, do signals occur with some degree of consistency to suggest that it is a regular practice by the Court to insert language of this variety into their opinions? Second, does the presence of signals in Supreme Court opinions cast any doubt on the two main models of judicial behavior—the attitudinal and strategic models? Finally, how widespread is the use of signals in opinion writing among the justices? Is it limited to certain individuals or types of justices, or does the practice extend to all the members of the Court? This section seeks to answer these questions.

Signals from the Supreme Court Justices to Congress occurred in over 10% of all of the Court's 671 statutory decisions issued between its 1986 through 1995 terms. The number of opinions containing signals varied by term, but each of the ten terms in the data set had at least one case with a signal and on average there were approximately seven written decisions with signals per year. Table 4.1 displays the frequency with which signals occurred in majority, concurring, and dissenting opinions as separated by signal type (very strong, moderately strong, and weak). The results of this analysis display a number of interesting features concerning judicial signals. Surprisingly, the vast majority, at nearly two-thirds, of all judicial signals can be found in majority opinions. In total, 46 of the 74 signals located were in majority opinions. Dissenting opinions, with 19, had the next highest total of signals, and nine signals were located in concurring opinions.

The results are surprising because they are difficult to explain under the two primary models of judicial behavior, both of which operate under the assumption in rational choice theory that the justices are simply trying to maximize the likelihood that their own policy preferences will be followed. Signals, at a minimum, are pieces of information being transmitted to Congress through the formal mechanism of a judicial decision. In many cases, they are invitations by the Court to Congress to overturn or

reconsider the decision just issued by the Court. If the attitudinal and strategic models offered the best perspective in explaining judicial behavior, one would not expect to see many signals, especially in the majority opinion, because the signal can work to override the decision just issued by the Court. Yet, not only are signals frequently present in Supreme Court opinions, they occur, by far, the most often in majority opinions, which represent the legal pronouncement of the Court in a particular case. In contrast, there are considerably fewer signals in dissenting opinions and even less in concurring opinions where the justices' writing is far less constrained because those opinions do not represent the "law" for that decision and have no *stare decisis* effect on future cases. This result is evidence of the possibility that signals from the justices are more than just information conduits but perhaps also represent a sincere effort on the part of the justices to improve policy and flag areas of concern for Congress to revisit in an effort, perhaps, to create good law.

One might reasonably hypothesize signals to be most prevalent in concurring or dissenting opinions where the justices are generally considered to be less constrained in their writing. When writing for the majority, the justice assigned to that opinion not only has to craft the opinion in a way that will garner the support of the majority of the Court, but he/she also must take into account that their opinion is an expression of the "law" on the particular subject at issue in the case that will shape future behavior and be relied on by lower courts and subsequent terms of the Supreme Court itself. As such, everything stated in a majority opinion has a degree of force and responsibility that cannot be understated. While various conventions still influence the justices when writing concurring or dissenting opinions, they are not burdened by the same constraints and have greater liberty in expressing themselves knowing that their opinion has less of a legal impact than does the majority opinion. If the justices were relying on signals merely to communicate information and not influence policy, then it is in concurring and dissenting opinions where we would likely see the most signals. Congress would, in effect, serve as an "appeal" venue for the losing justice(s). Yet, this is not the case, and because signals

are most often found in majority opinions, it is reasonable to find support for an alternative hypothesis that the justices may have a legitimate concern over the direction of public policy and producing good law even if it means overturning their decision.

**Table 4.1: Frequency of Judicial Signals (Strong, Moderate, or Weak) by Opinion Location of Signal: 1986-1996**

Type of Opinion	Strong	Moderate	Weak	Total
Majority	11	30	5	46
Concurring	4	5	0	9
Dissenting	10	8	1	19
<b>Total</b>	<b>25</b>	<b>43</b>	<b>6</b>	<b>74</b>

Note: Category descriptions and coding rules for signals being placed in “strong,” “moderate,” or “weak” categories is described in detail in Appendix A of this chapter. All Supreme Court decisions subject to a written opinion do not contain concurring or dissenting opinions. For those decisions containing signals that were issued “en banc,” meaning the decision was issued in the name of the Court without credit to a particular Justice or set of Justices, the signals were included in the “majority” category.

Source: Compilation of author based on detailed review of all Supreme Court decisions issued between the 1986 and 1995 Terms that contained signals. Coding rules for categorizing the type of signal and for identifying Supreme Court decisions containing signals are described in Appendices A and B. The Supreme Court decisions were uploaded from westlaw.com.

Table 4.1 also displays the frequency of judicial signals based on whether they meet the criteria for being a “very strong,” “moderately strong,” or “weak” signal. Overall, signals most often fell into the moderately strong category, as 43 of the 74 signals met the criteria for this category. Not far behind, however, was the frequency of very strong signals, with 25 of the remaining signals classified within this category. Only six of the signals met the criteria for the weak category. In the category of moderately strong signals, 30 of the 43 signals meeting this criterion were found in majority opinions, with eight located in dissenting opinions and only five in concurring opinions. There was more of a balance between the number of signals in majority and dissenting opinions within the very strong category, as there were 11 in majority opinions and 10 in dissenting opinions.

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This finding in the very strong category also undercuts some of the predictions from the attitudinal or strategic models. Under either model, one would not expect to see many signals in judicial opinions. But, if signals did occur, both models would likely predict that such signals be located in dissenting opinions. This is because it is reasonable to imagine that a signal in a dissenting opinion would be written with the purpose of enticing Congress to overturn the majority of the Court and adopt a policy position more in line with that of the dissenting justice(s). If the majority of signals were located within dissenting opinions this could be viewed as support for either of these two dominant theories of judicial decision-making. However, the fact that signals, where justices are inviting overrides, are more often present in majority opinions for both the very strong and moderately strong categories undermines the conclusion that the dominant pattern of behavior among the justices is to simply see their preferred policy position enacted. If that were true, given the nature of signals, one would expect to see very few signals issued in majority opinions. The precise opposite turns out to be the case.

Signals are regularly present in Supreme Court opinions, term after term, and that they can be found in all types of judicial opinions, most often occurring in majority opinions. But, on an individual level, do all of the justices participate in the practice of inserting signals into their opinions? Does the signaling behavior of justices correlate with a certain type of ideological position among those same justices? In other words, do liberal or conservative justices issue more signals or is it relatively equal? Tables 4.2 and 4.3 provide information directed at addressing these questions. In Table 4.2, the names of each of the justices who served at least one term on the Court between its 1986 and 1995 terms are displayed. In total, there were 14 different justices who met these criteria. The justices with the least amount of time on the Court during the period of study were Justices Powell and Breyer, with the former having served only one term and the latter two terms in that time span. In contrast, four justices—O'Connor, Rehnquist, Scalia, and Stevens—were on the Court during all ten terms under study. In addition to listing the names of each of the 14 justices, Table 4.2 also includes the average judicial

common space score<sup>12</sup> for each of the justices during their time of service between the 1986 and 1995 terms, how many terms each of the justices served on the Court during this time, the total number of signals issued by each of the justices, and the average number of signals per term of the Court issued by each justice. The results of this analysis reveal a number of interesting features concerning the relationship between signals and the type of justices who most often issue them.

On an aggregate basis, the two justices who issued the most signals during the period of study were Justices Blackmun and O'Connor, with 12 and 10 signals respectively. Both of these justices were appointed by Republican presidents (Nixon and Reagan), but in the latter part of his career Blackmun became considerably more liberal, based on his common space score, while O'Connor was more of a center-right justice, at least during this ten-year period. Justice White had the third highest total with eight of his opinions containing signals, and two other justices—Marshall and Stevens—were tied for fourth with seven signals each. White and Marshall were appointed by Democratic presidents while Stevens was appointed by a Republican, but Stevens, along with Marshall, were the more liberal members on the Court at this time. On the other hand, White, like O'Connor, was a center-right justice, based on his common space scores. On an average basis, the Court's most liberal members were among the most prolific issuers of signals. Blackmun, one of the Court's more liberal members at the time, had the highest average of 1.5 signals per term, immediately followed by the Court's two most liberal members, Marshall and Brennan, who had an average of 1.4 and 1.25 signals per term respectively.

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<sup>12</sup> Judicial Common Space scores, first developed by Epstein, Martin, Segal, and Westerland (2007), provide a numerical placement for each of the justices on a separately developed scale that ranges from extremely liberal to extremely conservative. The scores change each term based on each justice's decision behavior. The average represents the mean score for each justice during their entire period of service between the 1986 and 1995 terms. Publically available data files with these scores are accessible at: <http://epstein.law.northwestern.edu/research/JCS.html>

**Table 4.2: Supreme Court Justice Ideology (Common Space Score) and Frequency of Congressional Signals: 1986-1996**

Justice	Appointing President Party	Average Common Space	Terms on Court (1986-1995)	Number of Signals (Total)	Avg./Term
Blackmun	R	-0.414344975	8	12	1.50
Brennan	R	-0.693725525	4	5	1.25
Breyer	D	-0.28031555	2	0	0.00
Ginsburg	D	-0.2549896	3	3	1.00
Kennedy	R	0.177280189	9	6	0.67
Marshall	D	-0.73713288	5	7	1.40
O'Connor	R	0.19207809	10	10	1.00
Powell	R	0.12199766	1	0	0.00
Rehnquist	R	0.45750211	10	3	0.30
Scalia	R	0.44353923	10	3	0.30
Souter	R	-0.09348975	6	4	0.67
Stevens	R	-0.47723106	10	7	0.70
Thomas	R	0.59562952	5	4	0.80
White	D	0.130656414	7	8	1.14

Note: The Common Space score for each justice was determined by average the score from each term of the Court that the individual justice served between the 1986 and 1995 Court terms.

Source: Judicial Common Space scores developed and provided by Epstein, Lee *et. al* (2007). The data is publicly available at the following location: <http://epstein.usc.edu/research/JCS.html>. Information on the history of Supreme Court justices is located at: <http://www.senate.gov/pagelayout/reference/nominations/Nominations.htm>.

Even though the Court's more liberal members issued some of the highest number of signals, both on an aggregate and average basis, justices from all across the political spectrum took part in issuing signals. The Court's most centrist members run a close second to their more liberal counterparts in issuing signals. Five of the justices during this period of study hued somewhat close to the political center, ranging from -0.25 to 0.25 on the common space score spectrum, and each of them issued a high number of signals. The three on the center-right, O'Connor, Kennedy, and White, each issued ten, six, and seven signals respectively, all with an average per term at, or close to, one. Souter (appointed by a Republican president), who was, on average, just slightly left of center during this time, issued four signals during his six terms on the Court between 1986 and 1995 while Ginsburg, more left of center,

## Chapter 4: Judicial Signals

issued three signals during her three terms. The Court's most politically conservative members, while the most infrequent issuers of signals, still inserted such language into their opinions with regularity. Justices Rehnquist and Scalia, both with average common space scores around 0.45, each issued three opinions containing signals, and Thomas, the most conservative member of the Court at the time with a score of 0.59, issued four signals for an average of 0.8 signals per term. In total, with the exception of Justices Powell and Breyer who issued no opinions with signals but only served on the Court for a short period during the period of study (the least among any of the 14 justices), all of the remaining 12 justices issued at least three opinions containing signals to Congress. This demonstrates the breadth of this practice regardless of where on the political spectrum each of the justices may lie, the party of the appointing president, or the number of years of service on the Court.

Finally, Table 4.3 displays how often each of the 14 justices issued a signal in either the majority, concurring, or dissenting opinions, as well as how often each justice issued a "very strong," "moderately strong," or "weak" signal. The purpose of this analysis is to determine if certain justices produce the bulk of signals within any of these categories or whether, like the earlier picture, the number of signals within each category, by justice, is distributed somewhat evenly. The results within these two categories again show a fairly even distribution of behavior among the justices. With the exception of Justices Powell and Breyer (who issued no signals) and Ginsburg, all of the remaining 11 justices placed signals in at least two majority opinions written by them. Justice White placed seven of the eight total signals he issued in his decisions in majority opinions. Three justices—Blackmun, Marshall, and O'Connor—were tied for second with six signals in the majority opinions that they authored. A similar level of distribution can be found among signals in dissenting and concurring opinions.

Likewise, among the three categories of signal strength, a similar distribution among the justices is present. All except Justices Breyer and Thomas issued at least one "very strong" signal, and there was

a relatively even distribution of “moderately strong” signals among all the justices (without including Justice Breyer). Justice Blackmun was the lone standout among the justices in issuing “very strong” signals, as one-half of all the signals he included within opinions fell into this category. Thus, not only was Blackmun the most frequent issuer of signals, but when he did issue them they tended to be direct in identifying the problem with the statute and encouraging Congress to remedy the situation.

**Table 4.3: Opinion Location and Strength of Signal, by Justice: 1986-1996**

Justice	Majority Opinion	Concurring Opinion	Dissenting Opinion	Strong Signal	Moderate Signal	Weak Signal
Blackmun	6	2	4	6	4	2
Brennan	4	0	1	1	4	0
Breyer	0	0	0	0	0	0
Ginsburg	0	2	1	1	2	0
Kennedy	3	1	2	4	2	0
Marshall	6	0	1	2	4	1
O'Connor	6	2	2	4	5	1
Powell	0	0	0	0	0	0
Rehnquist	2	0	1	1	2	0
Scalia	2	1	0	1	2	0
Souter	2	0	2	1	3	0
Stevens	3	0	4	2	3	2
Thomas	3	0	1	0	3	1
White	7	0	1	2	6	0

Source: Compilation of author based on review and analysis of all Supreme Court statutory decisions between the 1986 through 1995 terms of the Court.

From this data, several key points are revealed that speak to the motivation of the Supreme Court in issuing signals to Congress and what, if any, goals the Court hopes to achieve. First, there is a measurable gap in the number of signals issued between the Court’s more liberal and conservative members. While, as noted earlier, all of the justices, regardless of their ideological disposition, issued signals, the Court’s most liberal members (as measured by their common space scores) clearly outpaced their conservative counterparts. Four justices during this time had common space scores of -0.40 or higher (meaning they were quite liberal), and they issued a total of 31 opinions with signals. In contrast,



three justices on the Court at this time were on the opposite of the political spectrum with scores of 0.40 or higher (meaning they were quite conservative), and collectively they issued only ten opinions with signals. The liberal/conservative discrepancy here amounted to nearly a three-to-one ratio. What might explain this disparity?

One likely explanation is that the willingness to issue signals correlates, to some degree, with the different theories of statutory construction held by justices on different ends of the political spectrum. It is certainly not universally true, but more liberal members of the Court tend to subscribe to a philosophy for interpreting statutes that tends to emphasize seeking out legislative intent or discovering the broader purpose of a law (Scalia 1997; Peretti 1999; Breyer 2005). In doing so, justices who subscribe to this philosophy are more willing to look at the legislative history of a bill in Congress and try to discover the purpose of a law beyond its plain text. This emphasis in interpretation necessarily involves Congress, and so it should not be surprising that justices who rely on this philosophy of statutory construction would in turn issue signals to Congress to revisit or amend a particular statute given their interpretation of any congressional purpose.

In contrast, the Court's more conservative members often follow a theory of interpretation called originalism or intentionalism. These philosophies of interpretation emphasize giving effect to the original purpose of a law or interpreting the law based on the text, as written, refusing to look outside the four corners of the text in determining meaning (Scalia 1997; Peretti 1999; Breyer 2005). These methods of interpretation rely to a far lesser degree on what Congress might have wanted to have accomplished with the law or what its intent may have been. Thus, their frame of reference in interpreting laws has far less to do with Congress than their liberal counterparts, and not surprisingly, they also issue fewer signals.

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The other feature of note is that the Court's centrists issued a high number of signals in their opinions that was on par with the Court's more liberal block of justices at this time. Five of the justices were between -0.25 and 0.25, with two left of center and three right of center. In total, there were 31 signals issued by these five justices, the same number as the Court's five more liberal members across this time span. In existing near the Court's political center, it is more difficult to assign any of these justices to one of the more rigid ideological boxes for interpreting statutes that the Court's more liberal and conservative members are more likely to adhere to in rendering their decisions. Justices at the Court's center tend to be more case-centric and more difficult to predict in their decision behavior. Feeling less ideologically constrained, it is reasonable to suggest that these justices have a legitimate interest in identifying concerns or latent ambiguities that may have emerged in a particular statute and notifying Congress of such an in effort to improve, or simply provide greater clarity to, a particular law.

### Conclusion

The central conclusion to be drawn from this analysis is that signals to Congress are regularly embedded into the opinions that Justices write when deciding the outcome of a case. More specifically, the signals occur with a relatively constant frequency during each term of the Court, the majority of Justices have written signals into their opinions at different times, Justices across the ideological spectrum on the Court all participate in the practice of writing signals into their opinions, and these signals continue to be included in opinions in term after term. While I have speculated over the different reasons why each of the Justices might issue signals that particular question is beyond the scope of this chapter. The fact of the matter is that the Justices engage in this behavior with regularity, which strongly implies that they feel it has some impact. My suggestion is that the impact is felt most forcefully within the halls of Congress, and that members of Congress are aware of these signals and seek to act on them. This, naturally, leads to the next chapter that deals explicitly with the question of

## Chapter 4: Judicial Signals

why Congress reacts to certain Supreme Court decisions. I propose that it is the presence of these signals that explains this behavior, but this hypothesis will be tested alongside several already well-established hypotheses that seek to better understand the answer to the question of why Congress reacts to the Court through reform legislation.

## **Appendix A: Coding Rules for Supreme Court Statutory Decisions**

*Strong Signal: If either of the following two conditions applied*

1. The opinion makes a *direct appeal* of Congress to act;
2. Saying *explicitly* in the decision that the statute as interpreted by the Court creates a problem (for the law itself or the litigant), and that it is something that Congress could or should reexamine.

*Moderate Signal: If any of the five conditions listed below applied*

1. The justice writing the opinion indicates *implicitly* that the statute interpreted by the Court creates a problem that Congress could or should look at. But Congress must be mentioned;
2. Indicating *explicitly* that the statute interpreted by the Court creates a problem *without mentioning* the need or importance of Congress taking direct action;
3. Saying that there may be a *problem in the future* to which Congress can respond;
4. Saying that Congress may be interested in acting or that it is free to act if it *disagree* with the Court;
5. Saying that the Court understands the statute in a particular way, but noting that Congress is free to amend or change the law if it believes the Court was *mistaken*.

*Weak Signal: The following condition applied*

1. Saying explicitly that Congress must speak more closely or directly for the Court to change its reading of the law or that Congress must make its intent clear to change the Court's reading of the statute, but *without referring to express disagreement* with Congress.

**Source: Adapted from coding rules developed by Hausseger and Baum (1999).**

## **Appendix B: Atlas.ti Codes for Locating Judicial Signals/Invitations**

Upon uploading all of the 671 statutory Supreme Court decisions between the 1986 and 1995 terms, I deployed the following coding scheme to locate relevant parts, if any, of the written decisions for evidence of signals from the justices to Congress. Three distinct codes, each with a collection of different keywords, were used to help focus in on those passages most likely to contain a judicial signal.

The first of the codes was labeled “Congress.” The purpose of this code was to find any areas among all the 671 decisions where the word “congress” or a synonymous term was used in the decision. All three levels of signals, by definition, include some type of reference to Congress, so this was an important parameters in narrowing in on those decisions, and the sections within them, likely to contain a signal. In addition to using the term “congress” (with appropriate root expanders) itself, I included a number of synonymous terms such as “legislature” or “senate.” The specific search criteria were as follows:

CONGRESS:=congress\*|legislature|legislative|senat\*|house|representative\*

To further refine the search, I also employed a code made up dozens of different individual search terms that could be indicative of an invitation from the Court to Congress to take some action to overturn or revisit the Court’s decision. For instance, when mentioning Congress and inviting an override, the justices would often use terms such as “amend” or “fix” in an effort to signal to Congress that some type of action or level of review was warranted. A particular passage was coded as an “invitation” if it contained one of the following terms:

INVITATION:=repair|revis\*|intent\*|purpose|disagree\*|wrong|incorrect|mistake\*|problem\*|concern\*|conflict\*|revisit\*|harsh|constru\*|judg\*|reserve\*|interpret\*|establish|discretion|amend\*|change|guidance|action|take|prove|undertake|left|misconstrue\*|matter|depart|provide|discard|fix|correct|responsibility|duty|obligation|require\*

Finally, to refine the list of results even further, a third code was utilized with various search terms indicating some reference to the law. When inviting Congress to overturn or revisit its decision, such invitation is always issued within the context of making a decision over the meaning of a particular statute, regulation, or court rule. There is always some reference to what the particular law is that is at issue in the case, the mentioning of which is typically within close proximity of the language referencing Congress to initiate an override or reconsideration of the underlying law. Thus, the code “law” was made up of the following search terms:

LAW:=code|statute|statutory|law|regulation|rule|section|act|policy|U.S.C.|§

With these three codes established and those passages within the 671 decisions containing one of these terms identified, I then used the query tool within Atlas.ti to focus in on only those passages where these three codes appeared in close proximity of one another. From this query, a list of possible results

is returned containing only those passages across the 671 written decisions that have at least one of the above-described terms from each of the three codes within 25 lines of text. With that report, I then reviewed each of the relevant passages and applied the coding scheme as described in Appendix A to determine whether or not there was a signal, and if so, whether the signal was strong, moderate, or weak. For those decisions containing some type of signal, I also recorded the name of the justice authoring the portion of the opinion that issued the signal and whether the signal was located in the majority, concurring, or dissenting opinion of the case.



## Chapter 5

With the rise of the modern regulatory state, the interaction of the legislative and judicial branches has become among the most important for defining U.S. public policy.

--Virginia Hettinger and Christopher Zorn<sup>1</sup>

Recently, with a renewed emphasis on the relationship between the branches of government and the development of policy, scholars have taken note of what has been described as a “continuing colloquy” between Congress and the Supreme Court in the development and interpretation of law (Paschal 1992). In previous chapters, I have illustrated some important elements concerning this “colloquy” between these two branches. In particular, by studying the details of reaction bills in Congress, we know that members of Congress regularly seek out, and cite to, the viewpoints and preferred positions of actors within both the Court and Executive branches when developing legislation. Likewise, by analyzing the content of Supreme Court decisions in statutory matters, I have detailed a regular and ongoing practice by justices to signal, or invite, Congress to override or modify decisions just issued by the Court by amending, or creating new, laws. The question that remains, however, is whether this interactive dialogue among the branches matters in terms of influencing the direction of public policy? While such a dialogue is, in and of itself, interesting, it is of far less significance if the evidence is anecdotal and descriptive, rather than empirically driven and objective, in demonstrating that court interactions actually move and influence the development of law in Congress.

The focus of this chapter, therefore, is on the statutory decisions issued by the Supreme Court and the causal relationship behind why Congress chooses to respond to a subset of those decisions through reform legislation. The judiciary is, for obvious reasons, a critical piece in the overall process of reaction bills, as it is those decisions that prompt the legislation in Congress. As discussed in previous

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<sup>1</sup> Hettinger and Zorn (2005, 5).



chapters, logically there must be some factor or set of factors germane to the decisions issued by the federal courts that prompts a congressional response. In other words, Congress does not develop legislation in a vacuum; rather, it is generally designed to address a specific problem or concern or achieve a particular goal. In the case of reaction bills, Congress is seeking to address a concern generated in one or more court decisions. It is also plausible to assume that any given court decision is disfavored by at least one party, potentially more, and any single case, therefore, could prompt a legislative response. Yet, the overwhelming majority of decisions issued by the Supreme Court, as noted in previous chapters, do not, and likely will not, be subject to a congressional response through the mechanism of a reaction bill or law.

With that understanding in mind, this chapter seeks to answer the central question as to why Congress selects certain Supreme Court decisions to respond with reform legislation while leaving the vast majority of cases untouched, at least with respect to initiating reaction bills. In seeking answers to this question, I will examine common characteristics and traits that are present in all of the Court's decisions, focusing particularly on those that are subject to a congressional response, to develop a better theoretical understanding for why particular cases receive a response. Second, with the necessary data and theoretical explanations in hand, I will empirically test a range of hypotheses in an effort to develop a more robust model explaining congressional reaction bills. To address these questions, I rely on the tools of regression analysis to analyze those variables, relevant to the decisions themselves, that may be predictive of the likelihood of a congressional reaction bill.

### *Court-Congress Interactions: Separation-of-Powers & Case Saliency*

One of the classic themes within the American institutionalism literature is the relationship between Congress and the Supreme Court (Pritchett 1961, Murphy 1962). Early on, these scholars recognized that policy-making in America emerges from a continuing interaction among “separated

institutions sharing power” (Neustadt 1990, 34). Despite this early insight, much of the initial scholarship lacked the empirical rigor to model such a complex relationship in an effort to better understand, and predict, future behavior in the arena of policy development. Recently, however, advances in both the theoretical and empirical approaches to understanding and studying this relationship have allowed scholars to develop two widely utilized models for understanding how different actors across these branches interact.

One of those approaches, the separation-of-powers (“SOP”) game, is a preference-based model developed by scholars to explain the nature of the interactions between these two branches (Ferejohn and Shipan 1990; Eskridge 1991; McNollgast 1992; Ferejohn and Weingast 1992; Segal 1997). Underlying the SOP game, relying upon rational choice theory, is the assumption that both Congress and the Supreme Court are strategic actors seeking to maximize their policy preferences while simultaneously recognizing the override capabilities of each branch. These models operate by envisioning different political actors engaging one another across a series of sequential moves. Any game is premised on the idea that there is a range of policy preferences from which the selected decision-makers may choose. The range of preferences is often referred to as the Pareto set of optimals, which is the point where “there does not exist an alternative point that makes everyone else at least as well off” (Krehbiel 1988, 271). In the case of the interaction between Congress and the Supreme Court, once the Pareto set is established, the ideological content of the Court’s decisions can be analyzed to determine where it falls relative to the congressional preference range. If the preference content of the Court’s decision is outside that range, Congress will likely revise the underlying policy closer to its ideal point. The expectation generated from these models is that Congress will only act upon one of the Court’s decision if the policy expressed in that decision is far enough from the optimal range of Congress.

Within a SOP scheme, it is also assumed that the Supreme Court, in deciding its cases, will make appropriate modifications to those decisions based on what it knows, or believes to be, the policy preference range of Congress (in an effort to avoid any override). The outcome of such strategic behavior is that the decision should fall somewhere in that optimal range but closest to the Court's own preferred position. In turn, if the Court is correct about the location of that preference range, Congress will be unlikely to initiate decision reversal legislation and the policy that is produced by the decision will at least lie close to the preferred position of the Court's majority. Inversely, therefore, if legislation is introduced to override the decision it is because the Court miscalculated Congress's preference range or because the preference point of a subsequent Congress shifted such that the new Congress's preference range is outside the range calculated in the earlier decision, eventually resulting in an override.

Separate and apart from theories emanating from the SOP model, a related line of scholarship envisions the reasons for decision reversal legislation as having less to do with the policy preferences of actors within these two branches and more to do with the saliency of the case and its impact on different political actors. This theory, known as the case-saliency or context-based model, rejects one of the central assumptions in SOP models that understands Congress to view all issues as equally salient; instead, arguing that the context of the decision, and those interested in it, matters (Henschen 1983; Solimine and Walker 1992; Ignagni and Meernik 1994; Meernik and Ignagni 1997; Ignagni, Meernik, and King 1998). The context-based model, therefore, rejects the assumption that all decisions by the Court have an equal probability of being responded to in Congress through reform legislation. Only those decisions that contain specific characteristics will generate enough attention in Congress to potentially prompt a reaction bill. The process for responding to Court decisions is driven by the various political actors involved in those cases and their desire to achieve a policy outcome in Congress that they could not achieve with the Supreme Court.

Thus, this line of research has shown that factors such as a decision's impact on Congress's power, when the United States is a losing party, or when a particular state, whose interests are represented in Congress, loses a case matter in terms of predicting when legislation will be introduced to override a case (Meernik and Ignagni 1995; 1997; Zorn and Caldeira 1995; Solimine and Walker 1992). Also, interest group activity in the case, as measured by the number of amicus briefs, and the saliency of the case, or topic at issue in the case, among the general public, all matter in predicting when legislation of this nature will occur (Hettinger and Zorn 2005). Decision unanimity has also been suggested to impact the likelihood of a reversal (Hettinger and Zorn 2005). This approach calls into question the assumption in the separation-of-powers scheme that the context of the decision is irrelevant and that any decision reversal legislation represents, simply, a conflict between the preferred positions of policy actors within these two branches.

Each approach offers a unique perspective as to what motivates Congress to initiate reform legislation, but the perspectives are not entirely inconsistent with one another. The separation-of-powers models operate from the assumption that any and all Supreme Court decisions could be overridden by Congress, and what is determinative of an override attempt is a gap in the preferred policy positions of the actors within each branch. In contrast, the case-saliency approach, or context-based model, assumes only a small subset of cases will ever realistically be responded to by Congress based on the unique characteristics that those decisions share. Common to both approaches, however, is one of the main tenets of rational choice theory, which is the assumption that the nature of the interaction between the branches is centered on conflict as different actors seek to maximize their *a priori* policy preferences. Because of this, both approaches can be integrated into a common empirical approach to evaluate the expectations of each perspective. But, neither approach can account for the possibility that the relationship between Congress and the Supreme Court may not always be based on competition and a desire for one side to achieve a preferred policy position in a zero-sum game. If we

are to be more confident in explaining why Congress initiates these reaction bills, any model must incorporate a theoretical approach not based on the central idea in rational choice theory that what motivates these interactions is a desire to secure one branch's preferred position.

### Signaling Theory

While both the separation-of-powers and context-based models differ over the universe of Supreme Court cases that Congress may respond to and the reasons behind such responses, they both operate from the assumption that any response from Congress is based on a desire by the members of that body to realize a policy outcome closer to their own preferred position vis-à-vis that of the position settled on by the other branch of government, in this case the Supreme Court. While there is considerable support for such a premise, what if the assumption that the actors across these branches are always self-interested policy-maximizers is not accurate for the universe of behavior among these actors? In other words, is it possible that these political actors have other goals and incentives in at least some situations beyond realizing their own personal policy preferences? If so, all the models attempting to explain why Congress responds to Supreme Court decisions start from an assumption that may not accurately portray how these actors actually behave, at least in the area of developing reform legislation.

An alternative explanation for what motivates actors in Congress to initiate and pass reaction bills can be derived from the cooperative/state-centered model detailed in earlier chapters. Within the contours of this model, political actors can be understood to operate in a more cooperative fashion with members of the other branches of the federal government both to legitimize the actions of each institution, in and of itself, but also to enhance the authority and dominance of the government. Each of these goals can be advanced by passing (and then continuously refining) good public policies. This is not intended as a normative claim about the policies themselves; rather, the idea is that there is an

interest in enhancing public laws so that they are clearer, easier to follow, predictable, stable, and more equitable and fair. Statutes, in other words, that make sense, have a logical flow to them, and minimize internal inconsistencies or unfairness in their application. When laws meet, or come closer to these criteria, I argue, it enhances the authority of the state and the legitimacy of those actors and institutions within the state apparatus so responsible. Importantly, such a theory stands in stark contrast to the assumption underlying rational choice theory that these actors work solely to maximize their policy preferences, which presumably would be advanced at the expense of fixing problems in the application of a law so long as the law continued to protect their preferred position.

Some scholars in this field have begun to advance the idea that in at least some cases these political actors work to achieve good policy even when such policy does not align with the preferred position of those same actors. In the sub-field of judicial politics in particular, a few scholars have cogently argued that the judiciary acts to achieve both good law and good policy (Perry 1991, Gillman 1993). Hausseger and Baum (1999), discussed earlier in Chapter 4, tested this very idea in the context of evaluating the reasons why the Justices on the Supreme Court insert invitations to Congress to override, and found strong support for the hypothesis that the Justices have an interest in achieving good public policy. If there is both theoretical and empirical support for the notion that the Supreme Court Justices can behave in such a fashion, it is reasonable to extend such reasoning for hypothesizing the behavior of members of Congress in responding to the cases decided by those Justices.

With the assumption that actors in the judiciary and in Congress can work to achieve good policy, even if that conflicts with their preferred position, I propose a relationship between the branches that is also more cooperative in nature, as these actors, in effect, work with one another to achieve this desired outcome of crafting good laws. Each of the branches have unique institutional powers and insights that aid in the process of enhancing the nation's statutory laws, and I propose that Congress

relies on the Court's expertise and insight in deciding what laws may need revision and improvement. Court cases, particularly those that reach the Supreme Court, highlight an area of law in which there is strong disagreement over its meaning. The justices on the Court are also experts at interpreting laws, and they do so in the context of actual disputes between two or more parties. All of this expertise and perspective can benefit Congress both in terms of identifying what laws may need to be revisited and then to offer some important insight as to the scope and direction of any such revisions.

The Court, I argue, recognizes the fact that it has an important role to play in analyzing the meaning of law and assessing its impact on society and, as I have shown in previous chapters, that Congress at least listens to some of the insights and opinions offered by the Court in its decisions. Likewise, Congress looks to the views of the executive branch, which is constitutionally charged with enforcing the laws so passed by Congress, for its views on the efficacy of those laws and the impact they are having in achieving the underlying policy objective(s). Both of these branches of government, I believe, recognizing their influence, have developed formal mechanisms for signaling to Congress problems or concerns they see in the application of these statutes. While such signals or influence can be channeled through a variety of mediums, one of the most extensive and well-developed is through court decisions where two or more litigants are locked in a dispute over the meaning and application of a particular law. These cases allow individual justices on the Court to signal their concerns to Congress through the decisions it writes (whether in majority, concurring, or dissenting opinions). The executive branch, also through the mechanism of these cases, can signal its viewpoint by and through the Solicitor General taking a stand on the case, whether as a party to the case through its representation of the United States Government or by submitting an *amicus curiae* brief on behalf of one side on the case. The statements and positions taken by the other two branches of the federal government, which information is then available to Congress, I argue, is a critical piece in the overall mechanism that motivates Congress to initiate reform legislation and institute changes to the nation's public law system.

### Modeling Congressional Reaction to U.S. Supreme Court Decisions

I propose a unified empirical model to test some of the key assumptions powering both the separation-of-powers and context-based models in addition to testing the new theory proposed in this chapter of an interbranch signaling system between the branches. In attempting to answer the question of why Congress reacts to certain Supreme Court decisions, each of these models rests on a key factor or set of factors to test a unique hypothesis as to what motivates this type of legislation. The separation-of-powers model assumes that any congressional response is a product of the Court making a policy choice in a particular decision that is outside of the present (or some future) Congress's ideal point. To measure this concept within a statistical model and test the assumption, it is necessary to gauge the ideological content of each decision in comparison to the ideal point of each Congress that follows the decision. The response from Congress is thus a product of a gap in preference between itself and the Supreme Court in a particular decision.

*Hypothesis #1: Congressional reactions to Supreme Court decisions are a product of the preference gap between the ideological content of a particular decision and that of the present (or a future) Congress's ideal point.*

A second possible explanation behind congressional reactions operates from a context-based model. Central to the assumption underlying this model is the proposition that the salience of the decisions and factors germane to the decision itself explain the basis for any congressional response. For instance, the amount of interest group activity surrounding a particular decision, the general public's knowledge about a Supreme Court case, or a particular State's interest in a case outcome. Additionally, the vote outcome in the decision, with unanimous decisions versus close 5-to-4 cases, has been argued to affect the likelihood of a response by Congress. In effect, the context model understands congressional responses to the Court's decision less as a product of a policy or ideological battle between these two branches and more as a product of outside groups and institutions seeking to achieve in Congress what they may have been unsuccessful in securing from the Court.



*Hypothesis #2: The likelihood of a Congressional reaction to a Supreme Court decision is the result of the saliency of the decision itself (as measured through a variety of factors).*

The final possible explanation, which departs most radically from the two main theories in the extant literature, posits that the main branches of government can work together, cooperatively, to achieve good policy. To reach such an outcome, it is necessary for officials within each of the three branches to communicate with one another to identify problems or concerns with existing laws and suggest a means for Congress to remedy the identified concern. This communication, I argue, manifests itself in a highly stylized and formal mechanism, with the Supreme Court communicating to Congress in the form of signals in the opinions its members write, and with the Executive branch communicating its desire to Congress in the form of the Solicitor General litigating a particular case or filing an *amicus* brief on behalf of one of the parties in a case that reaches the Supreme Court. The presence of these signals from the Court or the Solicitor General (representing the Executive branch), which I argued earlier are motivated by a desire to achieve good policy (at least with respect to the Supreme Court) is the causal mechanism explaining the decision by Congress to take up legislation affecting the outcome of a particular case decided by the Court.

*Hypothesis #3: Congressional reactions to Supreme Court decisions are the result of signals issued by the Supreme Court or the Executive inviting a response to the decision by Congress in the form of reforming legislation.*

To properly model and test each of these hypotheses, it was also necessary to incorporate a plausible theory for understanding the decision-making process in Congress. One of the most widely regarded and understood models in explaining congressional decision-making is the *distributive*, or committee-control, model (Shepsle 1979; Shepsle and Weingast, 1987; Krehbiel 1991). This model posits that committees operate as gate-keepers and play a central role in the development of legislation within Congress. In contrast, the *partisan* model that views the majority party as playing the functionally important role of controlling the congressional agenda (Cox and McCubbins, 1993, 2005). More recently, Segal (1997) has proposed a multiple-veto model that centers on the control exercised

by the median member at various veto points throughout the respective chambers and represents the broadest range of potentially critical actors across these different models.

Following the work of Hettinger and Zorn (2005) and Segal *et. al.* (2007), I developed two models based on the median member preferences in both the House and Senate. Existing theoretical work on the separation-of-powers model suggest that Congress will react to a Court decision when its preferences deviate substantially from those expressed by the Court in a particular opinion. To account, and test, for this proposition, I created two distinct variables representing alternative regimes for measuring preference disparity between the median member in the House and Senate and that of the Court in any given decision. One model includes a variable to account for whether or not the Court's ideal point, as reflected by the ideological score (to be discussed later) in each decision, falls between the median preferences of the House and Senate chambers. The second model, again relying on the median member score in both chambers, includes a preference variable measuring the absolute distance between the ideological score of a given decision and any gap with the median preference score of the closest chamber in Congress (House or Senate).

### Research Design

The unit of analysis for each model is the individual case subject to a full opinion as decided by the Supreme Court across a period of ten years. The cases selected for analysis were limited in several ways based, in part, on a resorting of data as presented in the Original Supreme Court Database. First, only those cases subject to oral arguments and decided by a written opinion were included in the dataset. These are the "so-called formally decided full opinion cases" (Spaeth 2008, 58). The models assume there is some type of policy statement in the Court's decision causing Congress to react, so decisions issued by the Court that contain no such statement, such as a single sentence order denying *certiorari*, are of no value. Second, only the Court's statutory decisions are included in the data set. The

## Chapter 5: Why Congress Reacts to the Court

Supreme Court Database can be sorted on this variable, limiting the analysis to only those cases involving an interpretation of a federal statute, court rule, treaty, and executive or administrative rule. Reaction bills, as discussed in earlier chapters, principally involve the amendment of, or creation of new, statutes in response to the Court's interpretation of an existing statutory scheme. On average, the majority of the Court's decisions in any term center on statutory matters, and because this is the primary type of reaction bill in Congress it is most appropriate to focus only on these cases. It is also likely that the dynamic between the Court and Congress is different in cases of Constitutional import, rather than those based on statutory law, so a conflation of these two types of cases could distort any results and conclusions drawn therefrom.

Finally, only those Supreme Court cases decided between the 1986 and 1995 terms were included. A ten year period was established in order to have a large enough sample size, given that the Supreme Court typically only issued between 100-150 decisions each term during this time frame. The data set was begun in 1986 because, as noted in earlier chapters, while the majority of reaction bills to particular cases are initiated within just a few years of the issuance of a decision, many cases are still subject to a congressional response a decade or more after they were issued. About 80% of reaction bills, however, respond to cases that are 20 years or younger, so starting in 1986 and ending in 1995 ensured that most cases that likely ever will be subject to a reaction bill are identified as such in the data set. Importantly, this period of time for the Court also witnessed a reasonable level of turnover, with 14 different justices serving on the Court for at least one term. At the same time, the Court remained relatively stable with the introduction of a new justice, on average, occurring every other term. Within these parameters, the Supreme Court Database identified 671 decisions, which form the basis of the data set used in the analysis to follow.

The dependent variables used in one of the two sets of models are derived from an analysis of legislation introduced in Congress between 1986 and 2008. The development of these variables was based on a systematic search of all committee reports from both the House and Senate, and any joint special or select committees, across this period of time (a complete description of the collection of data from committee reports can be found in Appendix B, Chapter 2). Upon identifying reactions bills in Congress, I also recorded what cases were the subject of the response thus allowing identification of which of the 671 cases in the data set were subject to a congressional response. For the first set of models, the dependent variable is a dichotomous indicator specifying whether or not the case received any type of legislative response after it was issued, regardless of whether that bill in Congress actually became law. Similarly, the second set of models includes a dichotomous variable measuring whether or not the case was subject to a congressional reaction bill, but only bills that became law were considered a “success” for these models and recorded as such in the creation of the dependent variable for the second set of models.

The search of these committee reports cross-referenced against the 671 Supreme Court decisions in the data set revealed 67 decisions overall that were subject to a reaction bill in Congress and 40 decisions that were reacted to in bills that became law. There is a dynamic component to each of the models, as not only can the Congress in session during the time in which a particular decision is issued react to that decision, but theoretically any subsequent Congress can initiate reform legislation in response to any previous case (assuming the Court itself has not overruled the decision on its own). Each decision, therefore, must be coded for the year in which it was issued but also for each subsequent year up until the time it is reacted to in Congress or until the end point in the data set (2008).<sup>2</sup> Thus, for example, if a decision issued in 1988 was not subject to a congressional response until 1993, each year

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<sup>2</sup> This methodology resulted in a total number of observations of 10,482 for the “All Reaction Bills” Models and 10,484 observations for the “Public Law” Models.

from 1988 through 1992 would be coded as a “0” and then 1993 would be coded as a “1” as the event, in this case a congressional response, occurs in that year.<sup>3</sup> If no response was ever initiated, each year is coded as a “0” up until the end of the data set in 2008.<sup>4</sup>

To test the hypothesis that ideology and a disparity over policy preferences between the Court and Congress drive the reaction bill process, it was necessary to create a measure that could quantify any preference gap. To accomplish this task, I developed an ideological score for each of the 671 Supreme Court decisions in my data set as well as a similar score for both the House and Senate in each of the relevant Congresses based on the median point for each chamber across the time span of this study. Since such an analysis involves actors across different branches of government, it was necessary to develop a common ideological scale. This was made possible by relying on two previously developed ideological scores that work from the same scale, the Poole and Rosenthal (1997) Common Space Scores for Congress and the Epstein *et.al.* (2007) Judicial Common Space Scores. These scores, set on a common scale, allow for a measurement of any gap between the Court’s preference in a given case and the preference of Congress.

The Judicial Common Space Scores provide a numerical score for each Justice during each term of the Court. From these figures, a judicial preference score can be developed for each decision, allowing for an ideological measurement for each case. Developing such a score cannot be a simple average of the nine Justices serving on the Court during a particular term. This is because a significant number of the Court’s decisions are not unanimous, and as my goal is to capture the ideological content

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<sup>3</sup> The year in which the event occurred represented the last observation in the dataset for a particular case.

<sup>4</sup> It is not uncommon for multiple bills to be introduced within a single Congress all of which are in response to one Supreme Court decision. When this happened, I selected the earliest bill that initiated the response through reform legislation, and recorded the dependent variable as a “1” for the year in which that event first happened. Likewise, if a particular reaction bill failed to become law and a new bill in a subsequent Congress was initiated to respond to the same case, I coded the reaction as occurring when the first bill was initiated. For the second set of models that includes only decisions that were reacted to and became law, the dependent variable was coded as “1” when the bill that eventually became law was first introduced.

of the particular policy statement being issued by the majority of the Court in any given case, it would skew the results by including the scores of those Justices who did not agree with the decision. The judicial preference score must, therefore, only include the individual scores of those justices who signed onto the policy statement of the majority. Any of the justices who only concurred or dissented from the majority opinion were not included. Therefore, the preference score for each decision was based on the average of those justices who signed onto at least a portion of the majority opinion.<sup>5</sup>

The preference variables were then constructed by measuring the judicial preference score against the median preference score in the House and Senate, as developed within the Poole & Rosenthal Common Space Score system. Two unique preference variables were created from this process. The first variable, labeled the “pareto set,” is a dichotomous variable coded “0” if the judicial preference score falls within the congressional preference range as measured by the median points between the House and Senate. If the judicial score falls outside the range it is coded as a “1,” enabling me to test the hypothesis that any decision outside the preference range of Congress increases the probability that it will be subject to a reaction bill. The second preference variable measures the precise gap between judicial preference score for each decision and the median preference score of the chamber in Congress closest to that decision’s ideological score, represented by the absolute distance between the two points. As the size of this continuous variable increases, this should also increase, proportionally, the probability that a reaction bill occurs if it is a controlling variable.

Both of the preference variables have a time varying component embedded within. While the preference score of each particular case is set at the time it is issued and remains constant over time, Congress itself is a constantly changing body, as a certain percentage of its members are regularly replaced through successive elections. As noted earlier, there is an indefinite period of time after which

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<sup>5</sup> If a justice signed onto a majority opinion but also issued, or signed onto, a partial dissent, they were not included in the average.

a Supreme Court decision is issued that Congress could respond. Thus, while the ideological makeup of Congress at the time any given decision is issued may be at point X, the preferences of Congress 10 or 20 years later may be at point Y. The dataset here, for practical reasons, is limited to the time period between 1986 and 2008, but these ideology variables shift over time as the preferences of Congress shift over time.

The saliency and decisional variables were developed from techniques in much of the existing literature testing the merits of the context, or case-saliency, model. The saliency variables are each developed from characteristics unique to the decisions themselves at the time they were issued, and thus none of these variables contain any time-varying components. These variables include measures accounting for whether or not a State was a losing party in the case, whether the United States (as a named party or a federal agency) was a losing party, the amount of interest group activity in a case as measured through the number of amicus briefs, and the saliency of the decision among the general public. Also, past studies have suggested that the voting behavior of the justices themselves may impact the likelihood of a congressional response, thus a measure accounting for the differing vote totals in each case is included.

The first of the saliency variables accounts for the interest of one of the key parties who regularly appears in front of the Supreme Court and its ability to lobby Congress to modify decisions it does not like. Congress, as a representative body, is responsive to a variety of institutions or interests that may seek to reverse or modify a decision issued by the Supreme Court. One such institution is the States themselves, and when a State is the losing party in the case this may enhance the saliency of the underlying issue in Congress as the State, through its representatives, seeks to overturn or modify the decision. Thus, if the State is the losing party in a case this is recorded as a “1” to signify the occurrence

of an event that, logically, would increase the saliency of a decision and the probability that the interests representing the State (both inside and outside of Congress) may seek its reversal.

A potentially equally important litigant is the United States itself. As both a frequent litigant, particularly in cases in front of the Supreme Court, and a consummate party in the development of federal law, the United States (i.e. the Executive Branch) is uniquely positioned to lobby Congress and raise the profile of a particular matter when it is directly involved in the underlying case. To examine the effect of the United States as a litigant, I include a variable coded as “0” when the United States is a winning party in a case or does not participate in the case as a litigating party. Conversely, when the United States is a party in the case and loses in front of the Supreme Court, this case is coded as “1.” Coding for this variable is based on the Original United States Supreme Court Judicial Database and its identification of the United States as the losing party in the case or for those cases that involve an administrative agency, such as the Environmental Protection Agency, who ultimately lost the case in front of the Supreme Court.

Various interest groups also often track the outcome of Supreme Court decisions and lobby Congress to take action on those decisions that are of interest to their members. The intensity of any lobbying campaign on a particular issue is often correlated with the number of distinct interest groups who have a stake in the outcome of any legislation pending in Congress. There is no readily apparent way to track the intensity of any lobbying of Congress by these interest groups; however, it is possible to measure the intensity of interest group activity with respect to any given Supreme Court decision by totaling the number of *amicus curiae*, or “friend of the court,” briefs that were filed with the Court in a case. There is often a close correlation between a case that is either controversial or would impact a broad range of groups and interests with the number of those same parties who petition the Court to file *amicus* briefs. Thus, to measure the saliency of a decision among interest groups therefore, it is



reasonable to count the absolute number of groups who filed *amicus* briefs with the Supreme Court in support of, or opposition to, one of the parties in the case, as a proxy measuring overall interest in the case. The greater the number of *amicus* briefs, the greater intensity of interest group activity that raises the saliency of a case. Data on the *amicus* briefs filed in Supreme Court cases was gathered by Collins (2008) and contains a comprehensive analysis of all Supreme Court decisions between 1946 and 2001.<sup>6</sup>

As the preeminent representative body in the federal government, the most natural constituency from which members of Congress take their direction is the public itself. A simple and straightforward gauge of the public's interest and knowledge about a particular Supreme Court decision is the level of media coverage the decision itself receives. The more attention drawn to a decision by the media the greater number of people who will learn about it and potentially petition members of Congress to react to the decision in some form. Two widely-used measures for assessing the saliency of a case among the public were combined in this model to develop a "public saliency" variable. One of those measures, developed by Epstein and Segal (2000), searches *The New York Times* to determine whether or not a decision issued by the Supreme Court appears as a story on the front page of the Times the day after the decision was issued. This offers a contemporaneous measure based on the time period during which the decision was issued. A more retroactive view of case saliency can be accounted for using the list of "landmark" cases as published by the *Guide to the U.S. Supreme Court* (formerly the *Congressional Quarterly's Guide to the U.S. Supreme Court*) (Savage and Biskupic 2004). This measure (hereinafter called the "CQ" measure) is based on the views of an expert analyst hired by *Congressional Quarterly* as to which of the Supreme Court's cases have withstood the test of time and can be classified as "landmark" opinions. To have both a contemporaneous and retrospective measure of case saliency, I

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<sup>6</sup> The data on Amicus Briefs made available by Collins (2008) was originally collected by Kearney and Merrill (2000) for the years 1946-1995. Collins collected the data in Amicus briefs from 1995-2001 and supplemented any missing cases as compiled by Kearney and Merrill for the years 1946-1995.

combined these two variables to create a new dichotomous saliency variable, coding those cases as “1” when they were salient under either the *CQ* or *New York Times* measure (formerly coded as “salient”).

Finally, much of the extant literature has hypothesized a relationship between vote outcomes in the cases themselves and the likelihood of a congressional response. Much of this work has taken the position that unanimous decisions decrease the likelihood of a reaction bill in Congress because those decisions represent a maximum level of institutional support by the Court for the opinion just issued. Inversely, therefore, split decisions, particularly 5-4 decisions, would have the least amount of institutional support and make them more susceptible to a response by Congress. Additionally, split decisions by the Court can raise the saliency of the case among the public, interest groups, or elected officials on the sole basis of the sharp division among the justices and the dissension this generates. I measure the variable “decision support” based on the difference between the number of justices in the majority (including concurring justices) versus the number of dissenting justices. This variable ranges from between one and nine, with a lower number expected to demonstrate an increased chance of a congressional response for the reasons just specified.

To assess the final hypothesis that signals to Congress from the other branches motivate reaction bills seeking to modify or override the very cases from which these signals emerge, I developed two distinct variables, one focused on the Supreme Court and the other on the Executive Branch. The first of these two variables, labeled the “Supreme Court signal” variable, is a dichotomous variable that records the presence or absence of an invitation in the majority, concurring, or dissenting opinions issued by the Court (the process for identifying invitations in opinions of the Court is detailed in Chapter 4). If the Court (acting through one or more of its justices writing majority, concurring, or dissenting opinions) issues such a signal to Congress and Congress later reacts by initiating reform legislation to

override or modify that same decision, there is more likely to be found a causal connection between these two events.

The second of the two signaling variables focuses on the Executive branch's view of the case, as represented by the views of the Solicitor General. The Solicitor General holds a unique position in the United States Government. The position is filled through a political appointment by the President and oversees an independent office within the Justice Department in an effort to support the Attorney General in the performance of his or her duties.<sup>7</sup> Like the rest of the executive branch, the Solicitor General is tasked with enforcing the laws of the United States, but this is accomplished through defending those laws within the federal courts, or State courts if the United States is a litigant.<sup>8</sup> The Solicitor General is the most frequent litigant at the United States Supreme Court. A representative from this Department is often referred to as the "10<sup>th</sup> Justice" given the frequency with which they appear in front of the Court and the fact that the Department defends the position of the United States government. This defense can come in the form of being assigned counsel for a government agency directly involved in the case or filing an *amicus curiae* brief on behalf of one of the parties (irrespective of what that party may be), which frequently occurs.<sup>9</sup> Given the Solicitor General's prominence within the Executive Branch and the Department's relationship with the Supreme Court, when they take a position on a case, particularly when they join on side as an *amicus*, they are signaling the Executive's viewpoint on the case.<sup>10</sup> When this very public position taken by the Solicitor General ends up being a

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<sup>7</sup> 28 U.S.C. §505.

<sup>8</sup> See 28 U.S.C. §517.

<sup>9</sup> See 28 U.S.C. §§517, 518.

<sup>10</sup> The Attorney General, and Solicitor General, are statutorily required to provide legal advice to the President and the heads of the various Executive Departments and to defend the interests of the United States in legal proceedings in either federal or State court. Given its legal obligations, one might argue that when the Solicitor General represents the United States or an Executive Agency that this is not necessarily reflective of the Executive's viewpoint on the law; rather, the Solicitor General is just fulfilling their statutory obligation to defend the interests of the United States, including those laws that have been lawfully passed regardless of their views on such laws. However, the Attorney General, and in turn the Solicitor General, may access a statutory mechanism for refusing to enforce a federal law even though such statute was lawfully passed by Congress and signed into law by the President. Under 28 U.S.C. §530D, the Attorney General is permitted to take the position that they will not enforce

losing position, their earlier position on the matter can be reasonably understood as a signal to Congress that they may want to revisit the underlying issue (law) or at least examine it further.

To measure this as a case variable, I created a dichotomous variable labeled “Solicitor General signal” that identifies whether or not the Solicitor General represented the United States in the case and was the losing party in the case or filed an *amicus* brief on behalf of what ultimately was the losing party.<sup>11</sup> In either case, the Solicitor General has taken a definitive position on the case, and when that position is a losing one in front of the Court, it is reasonable to then expect that the Executive (acting by and through one of its agencies) will act to reform the underlying statute at issue in the case by petitioning Congress. This variable is distinct from the variable capturing whether the United States was a losing party or not in that it only includes cases where the Solicitor General, on behalf of the United States, directly participated in the case (either as counsel of record or through the submission of an *amicus* brief on behalf of one of the parties), in contrast to those cases where an administrative agency was a party but the Solicitor General’s office may not have played a role. Also, this variable incorporates the Solicitor General’s informal involvement in a case through the filing of *amicus* briefs, which occurs with regularity.

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a particular federal statute, rule, or regulation on the grounds that the Attorney General has determined that such enforcement would be unconstitutional. This is not just a hypothetical power, as recently the Attorney General, Eric Holder, took this position in relation to a statute commonly referred to as the “Defense of Marriage Act” (DOMA), 1 U.S.C. §7. Pursuant to 28 U.S.C. §530D, Attorney General Holder notified Congress of this determination and that the United States would no longer defend the law to legal challenges in federal court, two of which were pending within the Second Circuit at the time of his determination. A copy of the letter can be located here:

<http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>

Thus, evaluating the Solicitor General’s position on a case is a reasonable proxy for evaluating the views of the Executive Branch given this statutory mechanism through which they can refuse to enforce and defend laws the Attorney General has deemed unconstitutional. It is, admittedly, not a perfect measure because if the Executive has a mere policy objection to a law but there is no reasonable constitutional objection, they will likely have to enforce it. But, the point here is that the Attorney General and Solicitor General have some discretion in what laws they decide to defend, so when they take a position defending the law this can reasonably be understood as representing the Executive’s view on the matter.

<sup>11</sup> Data on Solicitor General’s position was provided by Collins (2008).

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Because this final hypothesis has yet to be tested in the extant literature, it is reasonable to first ask whether there is any reason to suspect any correlation between signals from the justices themselves in the Supreme Court decisions or from the Solicitor General based on the position (if any) taken in those same cases and the presence of reaction bills. It turns out these two distinct signaling events are strongly interconnected with the actual cases that Congress takes up through these reaction bills and laws. Table 5.1 is a simple cross tab displaying the percentage of both Supreme Court cases that contained a signal from the justices and, separately, the number of cases with signals from the Solicitor General, in comparison to the total number of both all reaction bills and only reaction bills that became public law that were responsive to those same decisions.

Out of the total 671 Supreme Court cases in the dataset, 67 of those cases contained a signal from the Supreme Court (in at least one of the written opinions). As detailed in Table 5.1, 21 of the Supreme Court cases with a signal ended up being the subject of a reaction bill in Congress, which amounts to a rate of 31.3%. Likewise, there were 17 Supreme Court cases that were the subject of a reaction bill that eventually became law, resulting in an even higher percentage response rate of 42.5%. Separately, there was a signal from the Solicitor General in 142 of the 671 Supreme Court cases included in the dataset. Among only those cases that were subject to a reaction bill in Congress, 24 of that subset of cases also involved a signal from the Solicitor General, equating to a percentage of 35.8%. As was the case with signals from the justices, there were also 17 cases with signals from the Solicitor General among the 40 instances of reaction bills that became law, amounting to a rate of 42.5%. Just based on these figures alone, it is clear that both events—Supreme Court and Solicitor General signals—are closely correlated with reaction bills in Congress. Through this simple measure, therefore, there is strong justification for further inquiry into the nature of the relationship between case signals (from the Supreme Court or the Solicitor General) and reaction bills.

**Table 5.1: Percent of Reaction Bills and Laws Following a Supreme Court or Solicitor General Signal**

	Supreme Court Decisions:		Solicitor General Opinions:	
	With a Signal (n=67)	Without a Signal (n=604)	With a Signal (n=142)	Without a Signal (n=529)
Reaction Bills (n=67)	31.3% (n=21)	68.7% (n=46)	35.8% (n=24)	64.2% (n=43)
Reaction Laws (n=40)	42.5% (n=17)	57.5% (n=23)	42.5% (n=17)	42.5% (n=23)

Source: Compilation by author based on review and analysis of committee reports from the U.S. House of Representatives and Senate between 1967 and 2008 and a review and analysis of all U.S. Supreme Court statutory decisions between the 1986 and 1995 terms.

### Empirical Models

One of the hallmark features of legislative decision making in Congress is that it is “formally sequenced” (Stewart, 2001). The legislative process in the United States is best thought of as a series of hurdles that must be overcome for a bill to become law. Because these formal and well-recognized hurdles exist, the reasons why the thousands of bills that are introduced in each Congress advance beyond the different stages often vary. Thus, the motivation for members of Congress to advance a bill out of committee for a floor vote and the motivation to see a bill through the entire legislative process to become law, likely varies. To account for any variance in the entire legislative process as to what motivates members of Congress to initiate reform legislation that seeks to override or modify a Supreme Court decision, I developed two distinct models designed to account for any mixed motivation.

The first model incorporates all reaction bills involving the Supreme Court introduced in Congress during the period of study as the relevant dependent variable, regardless of the legislative outcome of the bill. This set of cases does not include those bills that were introduced by one or more members of Congress but never referred out of a committee for consideration by the floor in at least

one chamber, as identification of cases that the bill is designed to override or modify often do not emerge until the completion of the committee reporting process. But, all reaction bills that emerge from the committee process, even if they never cleared a floor vote in one of the chambers, are included. The second model includes only those bills that cleared all legislative hurdles and became law in specifying the dependent variable. Each of the two models is also tested using two distinct independent variables in order to evaluate any ideological disparity between the Supreme Court and Congress. As noted earlier, one of the preference independent variables is a dichotomous measure of whether or not the judicial common space score is outside the median common space score of the two houses of Congress. The other preference variable measures, in absolute terms, the difference in common space scores between a particular decision and the median common space score of the closest chamber in Congress. Both sets of models contain a dynamic element that permits measurement of the compatibility of the decision preference score with that of Congress over time.

Congressional attempts to override or modify Supreme Court decisions involve two unique elements that demand a particular empirical model. For one, while the cumulative effect of these events is significant, they represent a relatively small percentage of all bills produced by Congress. Additionally, there is a time-varying component, as just because the Supreme Court's decision does not generate an immediate congressional response does not mean one will not come at a later point in time. In fact, theoretically, there is an infinite period of time during which Congress could act to reform or modify the decision. To manage data of this nature, it requires an analytical framework that is robust to these unique data characteristics. The Cox Proportional Hazards Model, an event history, or duration, model is ideal for evaluating casual relationships amongst these dichotomous and categorical variables in the form of a variable time response. Duration models, of this type, permit one to query the likelihood of an event happening during any future time period when it has not happened in previous time periods. This condition, known as right-censoring, is built into the model. One of the benefits of

the Cox Model, thus, is that it distinguishes between actual failures and events that may occur in the future but just have yet to happen (right-censored data). Event duration models are also ideal for modeling rare events (Box-Steffensmeier and Jones 2004).

The preference variables in each of the models contain a time-varying component, based on the collective preferences of each successive Congress, and the Cox Proportional Hazards Models accounts for such variables by correcting any bias generated therefrom. This model “allows one to estimate the effects of individual characteristics on survival time without having to assume a specific parametric form for the distribution of time until the event occurs” (Box-Steffensmeier and Jones, 1997, 1432). I make no assumptions about the relationship between time and the occurrence of a reaction bill, but the advantage of the event duration model is that it accounts for the possibility that time is a factor and incorporates that into the analysis. If time is not important, the results are not impacted by the presence of a time variable in the model.

The following models are used to test the hypotheses advanced herein:

### Model #1

**Model 1-A:**  $Y(\text{Reaction Bill Considered}) = B_1(\text{Outside Pareto Set}) + B_2(\text{State as Losing Party}) + B_3(\text{U.S. as Losing Party}) + B_4(\text{Total Number of Amicus Briefs}) + B_5(\text{Public Saliency}) + B_6(\text{Case Vote Difference}) + B_7(\text{Supreme Court Signal}) + B_8(\text{Executive Signal}) + e$

**Model 1-B:**  $Y(\text{Reaction Bill Considered}) = B_1(\text{Ideology/Preference Gap}) + B_2(\text{State as Losing Party}) + B_3(\text{U.S. as Losing Party}) + B_4(\text{Total Number of Amicus Briefs}) + B_5(\text{Public Saliency}) + B_6(\text{Case Vote Difference}) + B_7(\text{Supreme Court Signal}) + B_8(\text{Executive Signal}) + e$

### Model #2

**Model 2-A:**  $Y(\text{Reaction Public Law}) = B_1(\text{Outside Pareto Set}) + B_2(\text{State as Losing Party}) + B_3(\text{U.S. as Losing Party}) + B_4(\text{Total Number of Amicus Briefs}) + B_5(\text{Public Saliency}) + B_6(\text{Case Vote Difference}) + B_7(\text{Supreme Court Signal}) + B_8(\text{Executive Signal}) + e$



## Chapter 5: Why Congress Reacts to the Court

**Model 2-B:**  $Y(\text{Reaction Public Law}) = B_1(\text{Ideology/Preference Gap}) + B_2(\text{State as Losing Party}) + B_3(\text{U.S. as Losing Party}) + B_4(\text{Total Number of Amicus Briefs}) + B_5(\text{Public Saliency}) + B_6(\text{Case Vote Difference}) + B_7(\text{Supreme Court Signal}) + B_8(\text{Executive Signal}) + e$

Each of the two sets of models (the first one measuring the influences on all reaction bills with the second measuring only those reaction bills that become law) permits a direct test of each of the three hypotheses detailed above. If ideology is the key mechanism motivating a response in Congress to Supreme Court decisions, either or both of the preference variables in each of the models should achieve a level of significance upon running the models. Likewise, if the case-saliency hypothesis is sound, one or more of the metrics capturing different features of a case that may make it salient should test as significant. The case-saliency variables include those measuring whether a State, or the United States government, was a losing party, the total number of *amicus* briefs filed in the case, the saliency of the case among the general public, and the vote differential among the justices in the case. While there are multiple variables for testing the case-saliency hypothesis, the significance of any one of them would result in acceptance of this hypothesis. However, because each variable only captures one element of a case's potential salient points, the more of these metrics that achieve significance the more one can be confident in the strength of any relationship between these factors. Finally, the signaling hypothesis is tested through the two variables capturing signals from the Supreme Court and the Solicitor General. If either of these independent variables is significant, I will accept this final hypothesis, which acceptance would only be strengthened if both variables were significant.

### Model Results

My task is to explain the reasons why Congress may respond to certain Supreme Court decisions through reform legislation designed to override or modify those decisions in matters of statutory import. The models described above are designed to test the two main hypotheses that have emerged, and been tested, to date, alongside my new hypothesis of interbranch signaling. Each of the models

represents a significant enhancement over past research in that the underlying data set is more comprehensive and relies on an empirical model designed to account for rare events that unfold across time. The results of the analysis show that each of the models represents a significant, albeit incomplete, improvement over the null model without the explanatory variables. In other words, we can reject the null hypothesis that the explanatory variables have no effect. The log likelihood function and chi square for each of the models also demonstrate that the independent variables are explaining a measurable component of the variance and that each of the models on a whole are statistically significant. Each of the two sets of models, one with all reaction bills and the other with only those bills that became law, while demonstrating some common patterns, also resulted in some unique findings.

**Table 5.2: Cox Event History Model for All Reaction Bills, Pareto Model**

Variable	Coefficient	Standard Error	P-Value	Hazard Ratio
Supreme Court Signal	1.499***	-0.27	0.000	4.478***
State as Losing Party	0.423	-0.39	0.273	1.526
Solicitor General Signal	0.780***	-0.28	0.006	2.182***
Total Amicus Curiae	0.111***	-0.027	0.000	1.117***
Vote Differential Among	-0.0549	-0.041	0.177	0.947
Case Saliency	-0.374	-0.36	0.302	0.688
United States as Losing	-0.166	-0.29	0.560	0.847
Pareto	-0.00513	-0.0044	0.249	0.995
Preference Gap	--	--		--
N	10482			

\*\*\* p<0.01, \*\* p<0.05, \* p<0.1

Log likelihood= -566.02164

LR chi2(8)= 54.61

**Table 5.3: Cox Event History Model for All Reaction Bills, Preference Gap Model**

Variable	Coefficient	Standard Error	P-Value	Hazard
Supreme Court Signal	1.494***	-0.27	0.000	4.454* **
State as Losing Party	0.405	-0.39	0.295	1.499
Solicitor General Signal	0.769***	-0.28	0.007	2.157* **
Total Amicus Curiae Briefs	0.110***	-0.027	0.000	1.117* **
Vote Differential Among Justices	-0.0465	-0.041	0.257	0.955
Case Saliency	-0.425	-0.36	0.244	0.654
United States as Losing Party	-0.178	-0.29	0.536	0.837
Pareto	--	--		--
Preference Gap	0.0142	-0.013	0.264	1.014
N	10484			

\*\*\* p&lt;0.01, \*\*

Log likelihood= -

LR chi2(8)= 54.56

Beginning with the set of models that utilizes the dependent variable measuring all reaction bills, regardless of their eventual legislative outcome, we see varying levels of support for the different hypotheses. Tables 5.2 and 5.3 outline the results for the all reaction bills/pareto model and the all reaction bills/preference gap models, respectively.<sup>12</sup> Several of the variables achieve statistical

<sup>12</sup> One of the main assumptions of the Cox proportional hazard model is proportionality. To determine whether the model satisfies the assumption of proportionality, I used the Schoenfeld and scaled Schoenfeld residuals tests. If the tests in the table are not significant (p-values over 0.05) then proportionality cannot be rejected and it is appropriate to assume that there is no violation of the proportional assumption. With the exception of one variable, none of the tests were significant allowing me to conclude that the proportionality assumption was not violated among the different variables. The only variable found to be significant in these tests was the Supreme Court signaling variable. To further examine whether the assumption of proportionality was violated, I ran a graph of the scaled Schoenfeld residual test for this variable. I discovered that it was not completely horizontal (meaning that it was

significance and their coefficients are signed in the expected direction within both models. Three of the potential explanatory variables achieve a level of statistical significance in each model, with the strongest level of support in these models for the interbranch signaling hypothesis. The variables measuring whether there was a signal in a given decision from the Supreme Court to Congress and the variable capturing whether the Solicitor General was on the losing side of the case achieve significance at the 0.01 level. These results are supportive of the conclusion that when the Solicitor General is on the losing side of a case in front of the Supreme Court or when the justices themselves invite Congress to take some action vis-à-vis the decision they just issued, it significantly enhances the likelihood of a reaction bill being initiated in Congress.

Support for the other hypotheses is far less conclusive. Five different case saliency or decision-centric variables were tested, and only one of these variables reached a level of significance in either of the two “reaction all” models. The number of amicus briefs filed in the case is statistically significant at the 0.01 level and positively signed, meaning that as the number of amicus briefs filed in the case increases the more likely Congress will initiate legislation to override or modify that decision. None of the remaining four case saliency variables appear to have any correlation with the occurrence of reaction bills. Within both of these models, neither of the preference variables was statistically significant. This suggests that under either of the alternating measures for evaluating a preference, or ideological, gap between the Court in a particular decision and that of preceding Congresses it is not the ideological preferences of Congress that appears to be prompting override legislation.

The results from the second set of models whose dependent variable is derived from only those reaction bills in Congress that actually become law produces a divergent set of conclusions concerning

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inconclusive as to whether the proportionality assumption was violated); however, I also used the log-log plots to examine this issue further and discovered the plots to be closely parallel of one another. Such a finding confirms that there is no violation of the proportionality assumption for that variable.

the hypothesized relationship with the various independent variables.<sup>13</sup> One of the most striking findings is that under both models—the public law/pareto model and the public law/preference gap model—there is also strong support for the interbranch signaling hypothesis, as was the case for the first two models that included all reaction bills. Tables 5.4 and 5.5, respectively, show the results of both public law models, and the variables capturing signals from the Supreme Court and the Solicitor General to Congress both achieve statistical significance at the 0.01 level. Thus, in both sets of models that rely on different, but related, dependent variables, there is strong support for the hypothesis that signals from the Court, through the opinion writing of the justices, or the Executive branch, acting through the Solicitor General, are correlated with decisions by Congress to initiate reform legislation. From there, however, the results diverge in meaningful and interesting ways from the models that use all reaction bills as the dependent variable.

As was the case with the first set of models containing all reaction bills, there was only tepid support for the case saliency hypothesis. Unlike the first pair of models measuring all reaction bills, the explanatory variable measuring the number of amicus briefs filed in the case was not significant in either of the public law models. However, the independent variable measuring whether or not a particular State was a losing party was statistically significant, albeit at the lower confidence of the 0.1 level ( $p=0.08$  in the public law/pareto model and  $p=.10$  in the public law/preference gap model). The remaining case saliency variables (the vote differential in the case, whether or not the case was salient among the public, and whether or not the United States was a losing party) were not significant. The

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<sup>13</sup> I again used the Schoenfeld and scaled Schoenfeld residual tests to determine whether the proportionality assumption was violated in either of the models. With the exception of one variable, none of the tests were significant allowing me to conclude that the proportionality assumption was not violated among the different variables. The only variable found to be significant in these tests was the Supreme Court signaling variable. To further examine whether the assumption of proportionality was violated, I also ran a graph of the scaled Schoenfeld residual test for this variable. I discovered that it was not completely horizontal (meaning that it was inconclusive as to whether the proportionality assumption was violated); however, I also used the log-log plots to examine this issue further and discovered the plots to be closely parallel of one another. Such a finding confirms that there is no violation of the proportionality assumption for that variable.

divergence in results between the two all reaction bills and public law models in relation to the case saliency variables is suggestive of the possibility that there is a different motivating sequence in Congress behind simply getting an override bill considered versus pushing an override bill through all the legislative veto points so that it can become law. Nonetheless, since most of the case saliency variables were not significant in either model, this undermines the strength of any hypothesized relationship between the saliency of the case and the likelihood of a congressional response through reform legislation.

The results of the two preference variables within the public law models also show some important differences from the two all reaction bills models. The results for these two variables are presented in Table 5.4 and 5.5. As was the case with the all reaction bill models, the pareto set variable, which is a dichotomous indicator measuring whether the ideology score of the case falls inside or outside the median range between the House and Senate, shows no meaningful impact on reaction bills that become law. However, unlike the case with the all reaction bill models, the second of the two preference variables, measuring the absolute gap between each decision's ideology score and the score of the median member from the closest of the two chambers in Congress, is significant at the 0.05 level ( $p=0.02$ ). The preference gap variable is a more precise measure of the actual ideological distance between the justices in the majority and the median figure in one of the chambers of each successive Congress. The hypothesized relationship suggests that as the gap in scores grows, meaning the Court in a particular case and Congress are more ideologically divergent, the greater the chance that Congress will initiate reform legislation that actually becomes law. The significance in this variable, overall, suggests tepid support for the hypothesis that ideology may be a motivating factor.

**Table 5.4: Cox Event History Model for Public Laws, Pareto Model**

<b>Variable</b>	<b>Coefficient</b>	<b>Standard Error</b>	<b>P-Value</b>	<b>Hazard Ratio</b>
Supreme Court Signal	1.898***	-0.33	0.000	6.671***
State as Losing Party	0.808*	-0.46	0.079	2.242**
Solicitor General Signal	1.296***	-0.35	0.000	3.654***
Total Amicus Curiae Briefs	0.0458	-0.036	0.201	1.047
Vote Differential Among Justices	-0.0782	-0.053	0.138	0.925
Case Saliency	-0.173	-0.44	0.694	0.841
United States as Losing Party	-0.539	-0.37	0.146	0.583
Pareto	0.00226	-0.0021	0.275	1.002
Preference Gap	--	--		--
N	10812			

\*\*\* p&lt;0.01, \*\* p&lt;0.05, \*

Log likelihood= -338.43406

LR chi2(8)= 48.19

**Table 5.5: Cox Event History Model for Public Laws, Preference Gap Model**

Variable	Coefficient	Standard Error	P-Value	Hazard Ratio
Supreme Court Signal	1.886***	-0.33	0.000	6.591***
State as Losing Party	0.756*	-0.46	0.101	2.130**
Solicitor General Signal	1.307***	-0.35	0.000	3.697***
Total Amicus Curiae Briefs	0.0452	-0.036	0.208	1.046
Vote Differential Among Justices	-0.0612	-0.053	0.252	0.941
Case Saliency	-0.273	-0.45	0.541	0.761
United States as Losing Party	-0.605	-0.37	0.106	0.546
Pareto	--	--		--
Preference Gap	0.0377**	-0.017	0.023	1.038***
N	10814			

\*\*\* p&lt;0.01, \*\* p&lt;0.05, \*

Log likelihood= -336.35907

LR chi2(8)= 52.36

The hazard ratio within a Cox Proportional Hazard models allows us to assess the actual impact of each independent variable. Mathematically, the hazard function is defined by the following formula:

$$h(t) = \lim_{\Delta t \rightarrow 0} \frac{\Pr(t \leq T < t + \Delta t \mid T \geq t)}{\Delta t}$$

This formula is designed to “quantify the instantaneous risk that an event will occur at time  $t$ ” (Allison 2010, 16). Interpreting the output of the model is not intuitive, but the hazard ratios in particular reveal important pieces of information. The hazard ratio tells us the predicted change in the hazard for each unit change in that predictor variable. Ratios equal to 1 mean that for each value change in the covariate the marginal increase or decrease in the hazard is 0. Likewise, ratios above 1 mean the hazard



is increasing for each unit change and ratios below 1 mean, correspondingly, the hazard is decreasing for each unit change. Another mechanism for interpreting hazards is to take the reciprocal of the hazard rate, which reveals the amount of time until the event occurs, or between events, assuming the hazard rate remains constant over time. Although the hazard rate is often discussed in terms of the probability that an event will occur at time  $t$ , it is not a true mathematical probability because the rate can be greater than one and has no upper bound (but it cannot be below zero).

The columns in tables 5.6 and 5.7 display the percentage change in the hazard rate for each of the statistically significant variables in the all reaction bills and only public laws models, respectively. Interpreting the hazards for the different variables depends on the type of variable involved. For dummy variables with values of 1 and 0, the hazard ratio only measures the ratio of the estimated hazard for those with a value of 1 to the estimated hazard for those with a value of 0 (controlling for other covariates). For continuous covariates, on the other hand, by subtracting 1 from the hazard ratio and multiplying by 100 we can learn the estimated percent change in the hazard for each 1-unit increase in the covariate. To convert this factor change into a percentage change, therefore, the following formula is applied:

$$\% \Delta = (e^{\beta k \Delta} - 1) * 100$$

Beginning with an interpretation of the two statistically significant dummy variables in the all reaction bills/pareto model, Table 5.6 displays the fact that the event hazard in cases involving a signal from the Supreme Court to Congress was about four and one-half times higher than the hazard when such a case signal was not present, and it was approximately twice as likely when the Solicitor General, representing the Executive Branch, was on the losing side of the case. The other significant covariate in this model was the number of amicus briefs filed in the case. For each additional amicus filing (equivalent to a 1-unit increase in the covariate) there is an 11.7% increase that a reaction bill will be

initiated in Congress. Similar results can be found in the all reaction bills/preference gap model, with the percentage change in the hazard rate with the presence of a signal either from the Supreme Court or Solicitor General being about four and one-half times and twice as likely, respectively, and the *amicus* brief percentage at the same amount of 11.7% greater.

**Table 5.6: Percentage Change in Hazard Rate for All Reaction Bills Models**

Variable	Pareto Model	Preference Gap Model
Supreme Court Signal	448%	445%
State as Losing Party	--	--
Solicitor General Signal	218%	216%
Total Amicus Curiae Briefs	11.7%	11.7%
Vote Differential Among Justices	--	--
Case Saliency	--	--
United States as Losing Party	--	--
Pareto	--	--
Preference Gap	--	--

**Table 5.7: Percentage Change in Hazard Rate for Public Law Models**

<b>Variable</b>	<b>Pareto Model</b>	<b>Preference Gap Model</b>
Supreme Court Signal	667%	659%
State as Losing Party	224%	213%
Solicitor General Signal	365%	370%
Total Amicus Curiae Briefs	--	--
Vote Differential Among Justices	--	--
Case Saliency	--	--
United States as Losing Party	--	--
Pareto	--	--
Preference Gap	--	3.8%

Table 5.7 displays a similar set of results for the two public law models. Here, in the public law/pareto model, the two signaling covariates, one from the Supreme Court and the other the Solicitor General, are again significant. But, the percentages associated with the presence of a signal versus no signal are even stronger, with the Supreme Court covariate when a signal is present being over six and one-half times higher than when no signal is present and the Solicitor General covariate being over three and one-half times more likely when there is such a signal. As was the case above, the percentages for these two covariates in the corresponding public law/preference gap model were equally high. In comparison to the other two models using all reaction bills as the dependent variable, the percentages in these models for these two covariates are much stronger, indicating that these

variables have an even stronger influence on those reaction bills that become public laws. The reason(s) for this cannot be directly discerned from the available data. However, it is plausible to suggest that when the justices on the Court signal to Congress a potential problem in the law or the Executive signals its view on a particular matter, as represented by the position taken by the Solicitor General in the case that Congress is more readily willing to pass a bill that results in an actual change to the law.

In the public law models, two other covariates were statistically significant and warrant some discussion. The covariate measuring whether or not a particular State was a losing party in the case was significant in both models, and the percentage change in the hazard rate when a State lost the case was two and one-quarter times higher in the public law/pareto model and twice as likely in the public law/preference gap model in comparison to those cases when the State was victorious or not a party to the case. In the public law/preference gap model, the preference covariate was significant; thus, for each unit increase in this variable (representing a growing ideological gap between the majority of justices in any given Supreme Court decision and that of each successive Congress) there was a 3.8% increase in the likelihood of a reaction public law. This seems relatively small; however, this variable ranges from 0.00 to 0.72, so an ideological gap, for instance, at the highest end of the range represents a 274% increase in the probability that a reaction law will take effect.

### Discussion

This analysis has presented distinct hypotheses for testing why Congress responds to Supreme Court decisions through reform legislation. Since the motivating mechanism for such legislation may be different, the models were distinguished between those bills that were introduced and considered by Congress as separate and apart from those bills that cleared all the legislative hurdles and became law. Each of the models were then tested using two distinct preference disparity variables alongside a

number of other covariates designed to quantify the saliency of the Supreme Court decision itself and any signals emerging from those cases from the Supreme Court or the Executive to Congress.

The most forceful conclusion to result from this analysis is that the presence of signals, from both the Supreme Court through their opinion writing and the Executive through positions taken on each of these cases by the Solicitor General, have a significant influence on the likelihood of reaction bills. In both the all reaction bills and public law models, regardless of which of the preference disparity covariates was included, the independent variables capturing signals from the Supreme Court or the Executive, by and through the position taken on the case by the Solicitor General, are statistically significant and demonstrate a meaningful impact on the likelihood of decision reversal legislation being introduced. Thus, one of the clearest conclusions to emerge from the analysis is that when the other two branches signal their preference or concerns on the meaning of a particular law, Congress is likely to take action modifying the existing law or creating a new one to address those concerns.

At the same time, however, there is tepid support for the other two hypotheses generated from the traditional SOP and case-saliency models that have occupied much of the scholarly attention in this field to date. Several of the saliency covariates were statistically significant in the different models. For instance, the number of *amicus* briefs was a significant variable in the models including all reaction bills, although a similar result could not be found in the models that included only reaction bills that became law. Inversely, whether or not a particular State was a losing party in the case was significant in the models measuring only the reaction bills that became law but it was not significant in the all reaction bills models. While, on the whole, these results appear to call into question the veracity of the idea that characteristics unique to the decisions themselves are the main motivators behind a congressional responses, the fact that some of these variables were significant is meaningful in terms of describing the mechanics involved in reaction bills.

Likewise, the results offer limited support for the position that an ideological disparity between the Supreme Court on any given case and Congress motivates this type of reform legislation. The results do suggest a gap in ideology can explain at least some of the basis behind a congressional response but only when the distance between these two bodies is greater and only in those cases of reaction bills that become law. The size of the gap is not statistically significant when measured against all reaction bills introduced in Congress regardless of their legislative outcome. The results for these covariates are mildly supportive of the premise that the branches are engaged in a series of strategic interactions with the end-goal of maximizing their own preferred positions. When the Court misreads the preferences of Congress, or those preferences change over time, the growing ideological gap does appear to explain some of the variation behind why Congress initiates reform legislation. However, this affect is limited to only those situations where the gap in ideology is relatively large and its influence is only meaningful among the subset of bills that actually become law.

In total, these results are supportive of past research on this topic while simultaneously opening up a new avenue of inquiry into considering why Congress initiates reform legislation in response to Supreme Court decisions. The models, as a whole, do a good job of explaining a measurable component of the variability between those Supreme Court decisions that do receive a congressional response and those that are left untouched. Although several of the metrics designed to test the ideological and case-saliency hypotheses did not prove to be significant, some of the specific independent variables were significant and confirm the vitality of these hypotheses. My own analysis should serve as confirmation of these two core ideas that have dominated much of the past research in this area. At the same time, however, I believe the more comprehensive database on court decisions and reaction bills in Congress presented herein, along with the introduction of this new concept of interbranch signaling, and a means for testing such an idea, represent a significant enhancement over the past research and a more robust model for mapping congressional responses to the Supreme Court's decisions.

In testing two distinct dependent variables in separate models, with one variable capturing all reaction bills and the other only including those bills that actually became law, I was able to test and measure the possibility that Congress may have a different motives among all the bills its considers that react to one or more Supreme Court decisions versus only those bills that actually become law. Upon isolation of the latter set of cases, the number of *amicus* briefs filed in the decision is no longer statistically significant. But among only those bills that become law, the fact that a particular State was a losing party is shown to have a likely impact on the initiation of these types of bills, which effect appears to be diluted when all reaction bills are included in the dataset. Past scholarship has argued that members of Congress have distinct motivations and attach varying costs to their political capital between the act of introducing legislation and supporting legislation through the various veto points in the legislative process (See Stewart 2001, 338). These results offer further empirical support for such an understanding of congressional behavior.

### Conclusion

Many of the previous attempts to better understand the ongoing colloquy between the branches, particular the Court-Congress relationship, have made important advances, but all such approaches have contained their drawbacks. The case study approach was revealing in its detail but limited in its ability to draw broader conclusions or to offer any predictive power regarding future events given the necessarily limited data set and methodology in such an approach. The separation-of-powers game has become the preferred and dominant approach for analyzing and understanding the interactions between Congress and the Supreme Court, but such an approach has its own serious limitations. For one, it assumes that the behavior among the political actors making up these branches of government is centered on conflict and contestation, with atomistic actors containing *a priori* policy preferences battling one another to achieve their preferred positions. In the previous chapters, I laid

out an explanation as to why such an assumption may not accurately reflect the behavior of these actors in all situations. By relaxing this assumption and opening up the model to other sources of motivation, I believe my approach more accurately allows for distinct motives that make up the Court-Congress relationship, at least in the context of reform legislation.

The separation-of-powers model also assumes that all Court decisions have an equal chance of a congressional response and, related to that belief, that factors germane to the decision itself matter little. The context, or case-saliency, models overcome this assumption by incorporating into the analysis factors that make the case more or less salient among government officials and the public alike. While this approach rejects the belief central to the separation-of-powers game that all cases are equally salient, it shares with that approach the idea that the branches are inherently in conflict with one another, with each side trying to maximize their own preferred position. The only difference between the models on this point is that the separation-of-powers game assumes the conflict is born from pure ideological gaps between the branches whereas the context based model assumes the conflict arises from certain decision-specific factors that make the case more salient with different interests or constituencies who in turn lobby Congress to modify the Court's decisions.

The problem with both of these dominant approaches is, as the information presented in this dissertation has shown, the assumption that the Court-Congress relationship is driven by conflict and contestation does not always reflect reality. While such an assumption is likely well-supported in explaining some of their behavior and interactions, I do not believe that to universally be the case for the reasons so outlined in this, and earlier, chapters. As astutely observed by Caldiera, McGuire, and Smith (1997, 4) "models should seek to mirror, as closely as possible, the realities they purport to represent." As I have argued throughout this dissertation, there are strong theoretical and historical reasons to believe that the branches often times work in a more cooperative and coordinated manner



to achieve a common set of goals, irrespective of any underlying ideological differences. In other words, at times I believe the duty to govern shared by these governmental actors can supersede the desire to achieve one's own personal goals. Thus, the approach taken herein has been to relax the assumption that the nature of this relationship is grounded in conflict, and in so doing it has opened up the possibility for other motivating factors to be analyzed in answering the ongoing question of why Congress responds to specific Supreme Court decisions with reform legislation.

As part of this exploration of the institutions of American government, I have sought to demonstrate that the reaction bill process, where Congress responds to specific federal court decisions through legislation that modifies or creates new statutory law, is a significant component of interbranch relations, particularly between Congress and the Court. The analysis presented herein is supportive of such a characterization. Accepting, for the moment, that I have provided constructive evidence in support of this position, then logically the nature of the interactions between these branches of government should reveal something, more broadly speaking, as to how these separate institutions sharing power work with one another to fulfill their primary duty to govern. It is with that understanding that the empirical findings detailed in this chapter hold their significance. If, at least in the context of reaction bills, actions taken by Congress can be understood as being motivated by input and direction those members receive from the other branches, then I would argue such evidence necessitates a reexamination of the dominant assumption among institutionalist scholars that this relationship is always defined by conflict and a desire of each individual actor and branch to maximize their preferred policy position. That other motivating mechanisms underlying this relationship may exist opens up the possibility for a critical reexamination of the literature on American institutions and governance.





## Chapter 6

[T]he Court is merely one of many redundant, transformative institutions, adding its own views and insights to the consensus building process...

--Terri Peretti<sup>1</sup>

Since the emergence of the public law sub-field within political science, much of the scholarship has been dominated by an analytical approach focused on the courts', particularly the Supreme Court's, decision-making process in isolation from the other branches. The concentration on the behavior of the Court's members has also largely come in the context of studying Constitutional doctrine. The analytic approach of this dissertation departs from this perspective; instead, relying on what more recent scholars have labeled as an "interbranch perspective" with an emphasis on the development of public policies (i.e. statutes). At its core, such a perspective assumes that policy-making in the United States of America is the product of the branches, and the political actors within them, regularly interacting with one another across a fragmented system of power.

The frequency and complexity of these interactions have been thoroughly documented herein within the context of reaction bills and the behavior of both members of Congress and the federal courts as they define and redefine federal statutes. In this final chapter, I conclude with a detailed case study highlighting many of the themes and empirical discoveries outlined in the earlier chapters in the context of a specific Supreme Court decision and congressional response. This final type of analysis will help solidify my argument that there is a truly integrated system of policy-making in this country, which cannot be parsed into discrete categories of study, that helps pave the way for a new paradigm of thought in measuring the separation-of-powers framework and its impact on policy-making in the United States of America.

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<sup>1</sup> Peretti (1999, 251).

### Cooperative Governance in Action: Immigration Reform

Immigration policy has, in recent decades, come to the forefront of American politics and, as a consequence, subject to numerous attempts by Congress over the years to regulate its contours. While recognizing the critical role that immigrants have played in the birth, development, and expansion of the United States, there has, for much of the country's history, been a tension between those born in the United States and more recent immigrants. Recently, growing attention has been devoted to the class of resident aliens who legally reside in the United States but commit crimes while they are here. Navigating the legal landscape in dealing with this class of persons is fraught with danger; however, the U.S. Constitution offers some important protections to all persons residing in the U.S. regardless of their citizenship status, a principle the Supreme Court has recognized going back to the late 19<sup>th</sup> century.<sup>2</sup> For instance, the 14<sup>th</sup> Amendment, containing the due process and equal protection clauses, uses the term "persons" rather than "citizen" in detailing the contours of its protections. As a result, immigration policy has been subject to a complex legal environment including numerous legislative forays and unique enforcement challenges. Thus, the interactions between the Court, Executive, and Congress are particularly revealing within this realm of public policy.

Since the Immigration Act of 1917, Congress has statutorily prescribed a comprehensive mechanism for the deportation of alien residents in the United States who have been convicted of certain classes of crimes, principally those involving acts of moral turpitude or illegal trafficking in narcotics. Continuing a policy from the 1917 Act, the Immigration and Nationality Act ("INA") of 1952 also delineated a general policy of deportation in such circumstances, but it also provided a procedure for alien residents convicted of such crimes to apply for a waiver from deportation from the Attorney General of the United States. The waiver procedure outlined in §212(c) of the INA, in recent years, had

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<sup>2</sup> Such a principle has been recognized by the Supreme Court since at least 1886 in the case of *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886).

become increasingly popular among resident aliens facing deportation, in part, because the class of crimes for which Aliens can be deported has grown increasingly large over the years. According to the Supreme Court, between 1989 and 1995 over 10,000 aliens were granted waivers by the Attorney General for what would otherwise be deportable offenses.<sup>3</sup>

In 1986, Enrico St. Cyr, a citizen of Haiti, was admitted to the United States as a lawful permanent resident. Nearly ten years later, Mr. St. Cyr, residing in Connecticut at the time, was charged with illegally selling a controlled substance in violation of state law. On March 8, 1996 he pleaded guilty to the crime, which subjected him to deportation proceedings under the INA. He applied for a waiver from deportation under §212(c) of the INA, which at the time of his conviction he was eligible for under the then-existing law. However, his deportation proceedings were not commenced until April 10, 1997, and during that intervening time period Congress had passed two new Acts, subsequently signed into law by President Clinton, which the Attorney General interpreted to result in the removal of his authority to waive deportation. With that determination, Mr. St. Cyr filed a *writ of habeas corpus* with the Federal District Court for the District of Connecticut, which court determined it had jurisdiction to review the *writ* and concluded that the new statutes passed after Mr. St. Cyr's conviction did not apply retroactively, making him eligible for a waiver under §212(c) of the INA. The Immigration and Naturalization Service appealed the case all the way to the Supreme Court, which body ultimately affirmed the decision of the lower courts.

The twist in the case was the result of two new laws that took effect in 1996, after Mr. St. Cyr's conviction but before his deportation proceedings were initiated. The new laws, the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which was signed into law on April 24, 1996, and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), which took effect on

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<sup>3</sup> *INS v. St. Cyr*, 533 U.S. 289, 296, 121 S.Ct. 2271, 150 L.Ed. 2d 347 (2001).

## Chapter 6: Conclusion

September 30, 1996, changed the deportation landscape. Collectively, these new statutes both narrowed the scope of offenses that would make an alien eligible for a waiver and gave the Attorney General the authority to cancel removal proceedings for only a very narrow class of deportable aliens. Together, the Attorney General interpreted these new provisions as removing his authority to grant waivers for any alien convicted of an aggravated felony and that the statutes removed the court's jurisdiction to review such determination. If such an interpretation was accurate, the result for Mr. St. Cyr and other similar situated resident aliens would be deportation and the inability for the courts to review whether the Attorney General's interpretation of the new statutes was accurate.

In granting the INS's petition for *certiorari*, the Supreme Court was confronted with two distinct legal issues. The first question was a question of justiciability, and concerned the affect of the new statutes on the availability of *habeas corpus* review under a separate statutory scheme, 28 U.S.C. §2241, and in turn the ability of the federal courts to review the Attorney General's waiver determinations. The resolution of this issue had a far greater impact on a broader class of persons, as it would affect all similarly situated resident aliens in the future. The other question confronted by the Court had a more direct impact on Mr. St. Cyr and concerned whether the two new laws passed after his conviction could be applied retroactively making him ineligible for the broader waiver provisions in place prior to the 1996 amendments. It would be, however, the Court's decision on the issue concerning the courts' judicial review powers that would eventually come to the attention of Congress once more and prompt additional amendments to the underlying law through a reaction bill.

In reviewing this primary issue over the court's jurisdiction, the INS, represented by the Solicitor General, took the position that four different sections in the two 1996 laws stripped the federal courts of their ability to review pure questions of laws as presented in Mr. St Cyr's petition for habeas corpus. Support for this notion can be found in the text of the two 1996 amendments. With the IIRIRA Congress

did expressly attempt to remove judicial review for criminal aliens. Specifically, §2429(a)(2)(C) provided that “[n]otwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed” one of various criminal offenses. The question for the Court was whether this provision, and other related sections, actually stripped the federal courts of jurisdiction to review habeas petitions under a separate statutory scheme located at 28 U.S.C. §2241. The Court’s answer to this question prompted further dialogue with Congress and an eventual reaction bill.

At the end of a lengthy review of the history of the *habeas corpus* petition and the Court’s previously established framework for evaluating jurisdiction stripping statutes, a majority of the justices rejected the Solicitor General’s argument on behalf of the INS that the 1996 amendments had removed from the federal courts, specifically the district court, an ability to review *habeas* petitions in cases of this nature. The Court found that the combination of an alternative judicial forum for discretionary review and the “lack of a clear, unambiguous, and express statement of congressional intent to preclude judicial consideration on habeas of such an important question of law, strongly counsels against adopting a construction that would raise serious constitutional questions.”<sup>4</sup> In reaching this conclusion and rejecting the Solicitor General’s position, the majority did signal to Congress a possible avenue of recourse if, indeed, its intent was to limit judicial review of deportation proceedings. Specifically, in a footnote attached to this conclusion, the majority stated “[a]s to the question of timing and congruent means of review, we note that Congress could, without raising any constitutional questions, provide an adequate substitute through the courts of appeals.”<sup>5</sup> The Court even provided Congress with a citation to one of its prior decisions supporting such a course of action, with a specific reference to *Swain v.*

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<sup>4</sup> *INS v. St. Cyr*, 533 U.S. at 314.

<sup>5</sup> *Id.*



*Pressley*<sup>6</sup> where the Court earlier found no violation of the Suspension Clause in the Constitution when a substitute forum for judicial review is provided.

Approximately four years after the Court's decision in *INS v. St. Cyr*, Congress initiated a reaction bill designed to override the Court's finding on the jurisdiction of the federal courts to review *habeas* petitions in cases of this nature. In the joint conference committee report attached to the final bill, Congress detailed its displeasure with the Court's ruling in the *St. Cyr* case and the reasons for additional amendments to the INA as a result of that case. In the committee report, members of Congress expressed frustration with the fact that just five years before this case, in the two 1996 Acts outlined earlier, Congress had sought to limit judicial review for criminal aliens. As the committee went on to explain, the perceived, and perhaps, actual effect of the decision reversed a clear congressional purpose expressed just five years earlier by expanding the judicial review rights of this class of aliens and providing them with an opportunity for review in both federal district court and the Court of Appeals. The committee was also concerned with the disparity this ruling created between criminal alien and non-criminal aliens facing deportation, in that the effect of the Court's ruling in *St. Cyr* was that criminal aliens would have more venues for reviewing deportation orders than is the case with non-criminal aliens.

Despite the clear frustration with the Court on this issue (as expressed by members of both chambers in the joint conference report attached to the bill), the committee latched onto the Court's advice on how to achieve a result close to what was originally desired without running afoul of the statutory drafting errors and constitutional problems that Congress's earlier efforts in 1996 had run afoul of in the eyes of the Court. In its report, the Committee cited to the Court's explanation in *St. Cyr* that criminal aliens could bring *habeas* petitions in federal district court under 28 U.S.C. §2241 because

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<sup>6</sup> 430 U.S. 371, 381, 97 S.Ct. 1224, 51 L.Ed.2d 411 (1977).

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the 1996 amendments to the INA never explicitly referenced §2241 when it discussed removing judicial review for criminal aliens' removal orders. The committee also took note of the Court's concern that because Congress never provided for an alternative forum for aliens to raise pure questions of law, which the Court believed would raise a constitutional issue under the Suspension Clause in the United States Constitution, the 1996 amendments could not be interpreted as suspending all judicial review. To remedy these problems, the Committee actually cited the Court's signal to Congress on how to "fix this anomaly" where the majority stated in its opinion that "Congress could without raising any constitutional questions, provide an adequate substitute [to section 2241] through the court of appeals."<sup>7</sup>

With the eventual passage of Public Law 109-13, Congress took the very action so directed by the Court. Section 106 of the new law once again amended the INA of 1952, but this time made clear that all aliens, including criminal aliens, have the right to challenge any deportation order on legal or constitutional grounds but only with the relevant court of appeals. As authority for this new framework, the committee also took note of the Court's reference in *INS v. St. Cyr* to an earlier Supreme Court case, *Swain v. Pressley*<sup>8</sup>, for the proposition that Congress can supplant the writ of *habeas corpus* so long as it provides an alternative forum that is both "adequate and effective."<sup>9</sup> While the new law overrode the effects of the Court's 2001 decision in *St. Cyr* on the issue of judicial review of habeas petitions in this class of deportation proceedings, it actually represented a compromise position between the two bodies and resulted in a partial return to the pre-1996 framework. The waiver restrictions from the AEDPA and the IIRIRA of 1996 remained, but Congress heeded to the Court's position that judicial review in some forum had to be provided for alien residents seeking to legally challenge deportation orders. At the same time, the fact that the Court's decision in *St. Cyr* arguably provided criminal aliens with a more

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<sup>7</sup> C. Rpt. 109-72 at 173, citing *INS v. St. Cyr*, 533 U.S. 289, 314 n.38 (2001).

<sup>8</sup> 430 U.S. 372 (1977).

<sup>9</sup> C.Rpt. 109-72 at 175.

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expansive review procedure than non-criminal aliens and the resulting confusion among the lower courts as to who had original jurisdiction to entertain legal challenges to deportation orders, were both issues that Congress sought to clarify with the amendments to the INA contained in Public Law 109-13. The revisions to the INA now contained both a clear reference to a suspension of the habeas petition process in 28 U.S.C. §2241 for review of removal orders and new language outlining the ability to have constitutional or legal claims raised by the aliens to be reviewed by the appropriate court of appeals.

### *Lessons from St. Cyr*

In detailing the cooperative/state-centered model at the outset of this dissertation, one of my many claims was that among a desire by political actors to achieve their own preferred policy positions there is a separate and independent motivation to achieve good public policy and a desire to govern effectively. This claim was not a normative one; rather, it defined “good” more in its procedural sense based on a notion of fairness, equality, due process, and clarity. To achieve this goal, and in light of the separation-of-powers framework embedded into the United States Constitution, I also claimed that the separate branches can, and do, work in a more cooperative and interactive fashion by communicating and working with one another to achieve this common objective of good governance. Communicating these concerns and efforts to improve any underlying policy manifest themselves in a highly formalized fashion, but as I have argued in earlier chapters, these somewhat subtle signals from the other branches are critical motivating factors in prompting Congress to revisit a particular policy and seek out ways for its improvement. The *St. Cyr* decision and the corresponding congressional response exemplify many of these points and serve as an important book end for the various arguments made throughout this dissertation.

In particular, this case exemplifies the fact that even when there is a divergence in preferences between, as in this case, Congress (joined by the Executive) and the Supreme Court, the branches can

work together to achieve a result that meets at least some of their respective interests and enhances an underlying statutory framework. Congress clearly had a desire to curtail the rights of criminal resident aliens, but the methods it chose through the 1996 amendments to the INA ran afoul of the Constitution and in conjunction with the Court's decision in *St. Cyr* ended up creating confusion among the federal courts and a divergent set of rights for criminal and non-criminal resident aliens facing deportation. The Solicitor General, arguing the case generally for the Executive branch and specifically, the INS, offered some more practical concerns over the ruling of the courts and how that impacts INS's deportation proceedings. The Court was clearly protective of its right to judicial review and concerned with the due process rights of those residing in the United States, but was also mindful of the democratic preferences of the people as manifested through the congressional action on this issue.

I submit that the overall tenor of interactions—like the one in the case of *St. Cyr*— are difficult to explain under the core tenets of rational choice theory and, instead, suggest a more cooperative system of interbranch relations. This case certainly exemplifies the fact that there can be clearly divergent preferences among political actors in the different branches resulting in a dynamic tension as the branches interact with one another, which is at the center of the interbranch bargaining framework mostly fully articulated by Cameron (2000). But, as this example highlights, there are also other important characteristics of this relationship that, I argue, cannot be explained if we are to assume these actors are regularly motivated by a desire to achieve their most preferred policy position.

The policy preferences of the majority of the Supreme Court were clearly at odds with Congress, and rational choice theory would predict, as occurred here, that the Court would issue a decision protecting its power of judicial review and maintaining the due process rights of persons residing in the United States. But if those same members of the Court's majority were exclusively or primarily interested in solely maximizing their own policy preferences, the language in their opinion signaling to

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Congress how to at least, partially, override the decision they just issued makes little sense. Rational choice analysis can account for these signals, but only as a strategic effort by the Court to maximize their preferences. The signal in this case had no strategic value for the majority in terms of preserving its preferred policy position because it was simply a prescription for undoing at least part of what the Court had just decided. If we are to assume that these political actors are primarily driven by a desire to only achieve their preferred position, it makes no sense why they would voluntarily help Congress eventually move the policy away from the position they just expressed in the decision.

Likewise, Congress chose a more cooperative path in response to the Court's decision contrary to what rational choice theory might predict. Congressional preferences (both in 1996 when the two Acts were passed and in 2005 when the reaction bill was generated) clearly resided outside the boundaries of the Court's decision. With such divergent preferences, rational choice theory likely would predict a path of more direct conflict with the Court, for example, by trying to strip the courts of any jurisdiction to review administrative determinations made by the Attorney General on deportation exemptions. Such an approach, which may have eventually been challenged again in the courts, would have accomplished the goals of the two 1996 Acts, which Congress in 2005 still clearly preferred. Instead, however, not only did Congress agree with the Supreme Court that a judicial forum for reviewing habeas petitions was necessary, it actually referenced the Court's suggested approach as authority for further amendments to the underlying policy.

This case also exemplifies the good governance goals of political actors across the three branches. The 1996 amendments to the INA caused a good deal of confusion over deportation waiver proceedings and severely disrupted a long-standing practice of permitting resident aliens facing deportation to challenge such proceedings with the INS or Attorney General and the federal courts. The Attorney General was of the opinion that the 1996 amendments to the INA stripped him of the ability to

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grant waivers and removed the ability of the federal courts to review whether the statutes actually deprived him of such authority. The federal courts, including the Supreme Court, staunchly disagreed with the Attorney General's conclusion on both points, resulting in a clear ambiguity on this point. The Supreme Court's decision also added to the confusion on the broader policy by creating a situation in which criminal aliens subject to deportation had a broader set of rights to challenge their deportation than was the case for non-criminal aliens. The disparity in such a policy made little sense and was something that Congress felt it had to later remedy.

The end product of all this confusion and back-and-forth, however, was a clearer policy that clarified the rights of the Executive branch to grant waivers, specified which branch of the federal courts had the right to review deportation orders, and harmonized the rights of criminal and non-criminal aliens facing deportation. Rather than a path of confrontation where each of the branches sought out their preferred position irrespective of the outcome of any policy battle, the end product here was a "good" policy (or at least a better policy), in terms of one that had greater clarity, fairness, and equity in relation to the status quo. In addition, in working together on this topic, the federal government improved its ability to govern and regulate this ever-evolving and complex policy arena. Congress largely maintained its goal of expanding the types of crimes that make resident aliens subject to deportation and restricting the ability of those same aliens to challenge such deportation proceedings. At the same time, the input from the Supreme Court and the Executive prompted further amendments to the law that clarified the Attorney General's waiver authority and the federal courts' ability to review deportation orders in a limited forum.

The analysis from Chapter 5 offered persuasive empirical support for the idea that signals from the Supreme Court and Executive are important motivating factors prompting congressional reaction bills, and this case helps to further amplify that point. Here, we have clear signals from both the

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Executive and the Supreme Court. The Solicitor General, representing the INS, clearly weighed in to the debate in favor of the interpretation of the 1996 Amendments to the INA taken by the INS and the Attorney General. In taking this position, and ultimately losing in front of the Supreme Court, the Executive branch clearly signaled to Congress, and all other interested parties, its view on how the 1996 amendments to the INA should be interpreted and applied. The Supreme Court, while disagreeing with changes to the INA made by Congress in 1996 and the Executive branch's subsequent interpretation of those amendments, recognized the democratic will of the people in this area and that its decision might be seen as contravening such will. The Court also explicitly suggested to Congress a way to achieve at least some of its underlying goals within the Constitution confines so required. Nothing obligated the Court to suggest such a "middle path" to Congress, but that signal definitely had an impact on Congress moving forward. As the congressional committee report makes clear, Congress took note of the Court's signal in crafting a response to the decision.

Not only do these signals serve as an important motivating factor in prompting reaction bills, the underlying message in the signals, particularly from the Court, can communicate important pieces of information to Congress. In *St. Cyr*, the Court's signal provided a legal path for Congress to at least achieve a partial goal of restricting the judicial review rights of criminal aliens subject to deportation. The Court's reasoning persuaded Congress to further amend the existing law along the lines so suggested by the Court. Thus, not only does the signal appear to have an important function in prompting the bill to begin with, but at least in this case, it appears to also affect the scope of any changes that Congress chooses to write into the new bill. The extent to which the information supplied to Congress by the Court through these signals actually influences the scope of any changes to the law remains a question for another day. But, this evidence is suggestive of the fact that the signals serve as an information conduit for the Court to convey important details to Congress, and it is a message that Congress appears to be listening to in some cases.

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Finally, this case and others presented throughout this dissertation present an alternative frame for evaluating the impact of judicial review in the American system. At first glance, this case seems to validate concerns about the anti-democratic tendencies of judicial review, as the Court clearly thwarted the efforts of Congress in 1996 to deal with criminal resident aliens. I would posit, however, that this case helps justify the Court's intervention without sacrificing the core principles of this nation. America, in addition to being a democratic system of government, is a nation ruled by law, with a written Constitution that is widely accepted as capturing out fundamental laws that cannot be broken absent a clear intention by a super-majority of the population. The Court reminded Congress of this obligation, and even though that finding frustrated Congress's original intent, upon a sober second thought, Congress recognized this deficiency by amending the law once more. But, with the Court's guidance, it amended the law in a way that at least partially captured its original goal from the 1996 amendments while operating more clearly within the parameters of the Constitution. The Court, in this case, helped to further the political discussion on immigration, with Congress at least partially achieving its goal of curtailing the rights of criminal resident aliens but doing so within a legal framework that respects the core principles of the Constitution.

### *Lawmaking & The Separation of Powers Framework: A Perspective*

Throughout much of its history as a distinct academic discipline, political scientists studying American institutions largely coalesced around the idea that the separation-of-powers framework was a misguided and disruptive force in American government. Left to its own devices, such a system would naturally tend toward incoherent policies, frustration among governmental actors, and general corruption in the political system. Many of the early scholars studying American institutions came to believe that the presence of a strong party system in the United States was our saving grace and the key to overcoming the institutional obstacles caused by the separation-of-powers system. In the mid-20<sup>th</sup>



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century, the notion of strong parties formed the basis for the development of the behavioralist tradition in American politics, and its contours were fleshed out by towering figures in the field at the time, such as V.O. Key, E.E. Schattschneider, Robert Dahl, and Richard Neustadt. One of the appealing characteristics of the behavioralist synthesis was that it was a unifying force in American politics, connecting seemingly disparate topics like policy making with voting behavior and electoral politics with presidential power.

In the 1960s and 1970s, however, behavioralism lost its hold over the field. This was due, in large part, to two unique events. For one, many of the political events during that time period could not be explained through the behavioralists' account. The reemergence of divided government, party dominance reestablishing itself in Congress, and the lack of any critical realignment elections (among other events) all undermined the behavioralists' account shared by most political scientists up until that point. Second, within the field itself, the development and application of rational choice theory to American politics caused a critical reassessment of how political institutions and governmental actors operate. As behavioralism subsided into the background and nothing immediately emerged to replace it, much of the discipline broke apart into discrete pieces with numerous sub-fields developing where scholars would specialize in the functioning of those different parts, ranging from Congress to public policy to the bureaucracy and the courts.

Within the emerging sub-field of law and courts, not only did scholars tend to study the courts separate and apart from the other branches and other aspects of American government, but an almost singular focus on the decision-making process by federal judges and Supreme Court justices came to dominate the field. Historically, much of the academic work on courts had come out of the nation's law schools where the basic "legal" model of judicial decision-making had been relied on, premised on the idea that judges decide cases based on the literal dictates of the underlying law and long-held

conventions like *stare decisis*. Relying on the rational choice analysis, political scientists within the emerging law and courts field developed a competing and comprehensive model, now known as the “attitudinal” model to explain the process by which judges decide cases. This model finds that “judges decide disputes in light of the facts of the case vis-à-vis their sincere ideological attitudes and values” (Segal 1997, 28). In other words Justice “Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he is extremely liberal” (Segal & Spaeth 1997, 65).

The impact of rational choice analysis, however, was felt far beyond the new law and courts subfield and eventually helped to bring about a new unifying approach to the study of American politics. What came to be known as the “New Institutionalism” approach focused on the constitutionally-mandated system of “separated institutions sharing power” (Neustadt 1990, 34) and the policy outcomes produced by the dynamic interactions within this fragmented approach to governance. This new approach was perhaps best captured by Roger Myerson when he concluded that the “constitutional structure of a democracy may influence the conduct of its politicians and the performance of its government (1995, 77). This idea, now commonly referred to as the “structure-conduct-performance paradigm” (Cameron 2000, 262) spawned what Cameron has referred to as an “orgy of model building (2000, 263) and a greater recognition of how our pre-determined institutional constraints, found within the Constitution, dictate the actions of individual actors and the policies they collectively produce.

The New Institutionalism scholarship came to embrace the separation-of-powers framework for what it is and showed that government could remain productive and produce coherent policies in spite of the natural antagonisms created by a constitutional structure that divided power and set the institutions of government in tension with one another. Mayhew’s (1991) pathbreaking work that showed legislative productivity was just as high during periods of divided government as opposed to unified government and opened up a period of model building seeking to explain why this was the case.

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Beginning from the structure-conduct-performance paradigm, scholars like Krehbiel (1998) and Cameron (2000) examined how institutional features like the filibuster in the Senate or the President's veto authority influenced the behavior of these actors and dictated the outcome of the policies they were able to produce through their cross-branch interactions. Cameron (2000), in particular, was able to successfully argue that what passes for governance in the United States is the product of a constant haggling and back-and-forth between the branches, but, through the act of bargaining, the various parties in the different branches of government could work together in an effort to govern and produce laws despite the unique institutional features of the American system that heighten the potential for conflict among the branches.

Central to much of this work is the utilization of rational choice analysis and the assumptions that such an approach is built upon. The idea central to this theory is that governmental officials are all autonomous actors with *a priori* policy preferences, and from this, their behavior is dictated by an effort to maximize their own policy preferences. Operating from such an assumption, situated within the separation-of-powers framework, many of these scholars viewed the interactions of these officials in the lawmaking process to be defined by a constant state of conflict and contestation. The policies to emerge from this perpetual haggling back-and-forth reflected the efforts of each side to maximize their own preferences in light of the constraints imposed upon those preferences by the other branches. Cameron (2000) argued that such a system demanded that the parties bargain with one another to mediate this conflict and actually fulfill their governing responsibilities. Thus, he, like many other scholars in this tradition, relied on noncooperative game theory to model the relationship between the branches in an effort to discover the reasons why these actors behave the way they do in the development of public policy.

## Chapter 6: Conclusion

My task in this dissertation has not been to refute the basic tenets of rational choice theory or argue the models produced by these distinguished new institutionalist scholars relying on noncooperative game theory are not descriptive or predictive of inter-institutional behavior. Rather, I have argued that such an approach, and an attempt to use it to develop a broader framework of governance, is incomplete and not sufficiently comprehensive. As I noted at the outset of this dissertation, there are numerous theoretical and empirical reasons to believe that much of the governance that takes place in the United States cannot be readily explained in the models produced by rational choice theory. It is difficult, if not impossible, to imagine that given the sheer number of interactions between various political actors across the branches occurring each day that this relationship could be defined by a near-constant state of conflict and contestation. The forces motivating these interactions are mixed, and the evidence presented in this dissertation shows that a significant aspect of these interactions are driven by a more cooperative desire, shared across the branches, to more effectively govern the nation, even if that comes at the expense of the preferred position of one branch and the political actors therein.

As I have discussed, the separation-of-powers framework remains one of the defining features of the American system of governance to this day. While, historically, many scholars and commentators have viewed this aspect of the U.S. Constitution as one of the greatest blunders of the Founders, the more recent scholarship on interbranch relations and lawmaking have faulted such a conclusion by showing, both empirically and theoretically, that consensus and coherent policies can be regularly achieved regardless of any political division between the branches being located at its nadir, zenith, or some point in between. Relying on rational choice theory, however, much of the scholarship (up until this point) has argued that the policy agreements are the result of negotiated settlements between the respective parties, principally those actors within the legislative and executive branches. Each of the branches has, in effect, come to recognize the strategic limitations that each can impose on the other.

## Chapter 6: Conclusion

As a result, each side seeks to mediate a settlement that most closely approximates their own preferred positions while accommodating, as minimally as possible, the viewpoints of the other branch. Thus, regular and coherent policies can be produced “*through* interbranch bargaining rather than *despite* it” (Cameron 2000, 269).

I concur with the same basic sentiment that the separation-of-powers system should not be viewed as the great American blunder when it comes to policy construction; rather, it is system, unique as it may be, that still allows for thoughtful, coherent, and regular policies to be produced even though power is separated and shared among the three branches. The notion that this dissertation challenges, however, is the idea that what passes for governance in America is a state of near-constant tension with various actors battling back-and-forth with the primary goal of always achieving their most preferred position. The data and arguments put forward in this dissertation have sought to challenge that idea in two ways. I offered a competing framework for governance that recognizes a more cooperative thread running between the branches that often unites them in a shared goal of producing coherent and effective policies. To emphasize and empirically support this argument, I highlighted an under-studied source of interactions between all of the branches, but principally the Supreme Court and Congress, where, I argued, this more cooperative interbranch spirit is regularly displayed. In the context of these reaction bills, when Congress regularly responds to decisions by the federal courts, I have sought to demonstrate that in spite of ideological and policy divisions that exist within and between the three branches of government, they can work together to regularly produce public policies that advance efforts to govern the nation in an effective and productive fashion.

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